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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE BRANGIER,	)	
Defendant-appellant,	)	
vs.	)	No. 18789
JOHN B. ROSENTHAL,	)	
Plaintiff-appellee.	)	
	)	

OPENING BRIEF
of
APPELLANT

DARAL G. CONKLIN
First National Bank Building
17th floor
Honolulu, Hawaii

Attorney for Defendant-Appellant

Of Counsel:

SMITH, WILD, BEEBE & CADES

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the case under the provisions of Title 28 United States Code §1332.

This court has jurisdiction of the appeal under the provisions of Title 28 United States Code §1291. This court's jurisdiction has been obtained pursuant to the Federal Rules of Civil Procedure.

Plaintiff's Complaint (R.2-6) alleged diversity of citizenship and amount in controversy in excess of $10,000. Defendant's Answer (R.22-24) admitted the diversity but denied the amount in controversy.

Diversity of citizenship was shown in fact through plaintiff's testimony of California citizenship (p.3 of Exhibit P-30), and Defendant's testimony of Hawaii citizenship (R.114). The amount in controversy was put to test by Defendant's Motion to Dismiss for lack of jurisdiction (R.7-15), which Motion was denied (R.25-26).

STATEMENT OF THE CASE

Prior to April 16, 1958, John Rosenthal, plaintiff below, and George Brangier, defendant below (hereinafter referred to as Rosenthal and Brangier), had engaged in various oral discussions (R.115, R.193) and correspondence (Exhibits P-1 & 2), concerning certain land in Tahiti owned by Brangier.

On April 16, 1958, Brangier in Honolulu wrote a letter to Rosenthal in San Francisco offering to sell the Tahiti land to Rosenthal for $35,000, of which $10,000 was to be paid in cash, and the balance of $25,000 to be sent "in about three week's time" to Bishop [now First] National

Bank in Honolulu, "to be held in escrow for delivery to me upon my delivery to the bank" of a deed similar to a sample deed enclosed by Brangier. (Exhibit P-3).

Rosenthal replied to the offer by a letter of April 24, 1958, which enclosed the $10,000, "under the terms mentioned in your recent letter." (Exhibit P-6, R.196).

Brangier had previously told Rosenthal that there would be "no problem" in obtaining French government consent to the transfer (Exhibit P-1), but both parties knew and anticipated prior to the making of the contract that the consent of the French government was required for any fee simple transfer of Tahitian land, and that there would be a problem in obtaining such consent (R.363). 1/

The day after Rosenthal accepted, he again wrote Brangier, in somewhat the same vein as Brangier's letter of April 16 and Rosenthal's reply of April 24, except that the consideration recited was $25,000 instead of $35,000, and Rosenthal added that "If, for any reason, the sale as contemplated is not effected, all sums are to be returned to me." (Exhibit D-2).

On the same day -- April 25, 1958 -- Brangier wrote to Rosenthal, stating among other things, "I will

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1/ Although the French policy was to deny consent to any foreigner's purchase of Tahiti land (Exhibit P-30, p.19), lack of consent was not here anticipated because the sale was between two foreigners and did not involve more French land passing into foreign hands. (Exhibit P-5).

arrange everything at the bank at $25,000, so that you and your cautious legal advisers will sleep." (Exhibit P-7). Brangier evidently did so. (Exhibit P-8).

On May 2, 1958, Rosenthal wrote to Brangier (Exhibit D-4), enclosing a copy of his letter of instructions to Bishop Bank regarding the $25,000 balance to be deposited in escrow. In the letter, Rosenthal asked Brangier to deliver the instructions to the bank "if they are satisfactory." Brangier testified that while he did not leave Exhibit D-5, being his copy, with the bank, he did show the copy to the bank official involved. (R.354)

Exhibit D-5 is Brangier's copy of Rosenthal's letter of instructions to the Bank, wherein Rosenthal stated "...I am depositing with you the sum of $25,000.00".

Rosenthal admitted that he never sent the original of Exhibit D-5 to the Bank, and that he never deposited the $25,000 with the Bank. (R.256-257), as recited in his letter to the Bank, and as agreed in the correspondence.

At the time of these events, Rosenthal was in the process of obtaining a divorce, and was interested in keeping the Tahiti property as his separate property, rather

than having it classed as community property.[2/] (R.218-222). Accordingly, also on April 25, 1958, Rosenthal's San Francisco attorney, Vincent Cullinan, wrote (Exhibit D-3) to Marcel LeJeune, who was Brangier's "notaire" in Tahiti, a "notaire" being roughly equivalent to our attorney at law (R.117), inquiring as to the effect of French law on Rosenthal's problem.

LeJeune responded that the effect would be the same as under California law, and suggested a delay until the divorce became final, or the possibility of using a French corporation to bypass Rosenthal's community property problems. (Exhibit D-7).

Cullinan thereupon wrote to Rene Solari in Tahiti, by letter of May 16, 1958 (Exhibit D-8), erroneously (Exhibit P-11) believing him to be an attorney, although in fact Rene's son Jean Solari was a notaire and became Rosenthal's Tahiti counsel. (R.172, R.202).

In Exhibit P-11, and in subsequent correspondence, the community property and tax consequences of creating a

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2/ The day after Rosenthal sent Brangier the $10,000 cash down payment, Rosenthal filed in his California divorce proceedings a schedule of his assets, but did not list the Tahiti property or the existence of the contract with Brangier. Some time later, a series of interrogatories relating to his assets were served upon Rosenthal, which his attorney answered in Rosenthal's absence, and Rosenthal subsequently filed a sworn verification of the answers. Again, although other land contracts were disclosed, Rosenthal made no mention of the Tahiti property or contract. (Exhibits D-39 through D-45).

French corporation to take title, instead of Rosenthal himself, were discussed among Brangier, Rosenthal, Cullinan, LeJeune and Rene Solari (Exhibits P-9, P-11 through 14, D-8 through 14, and D-17 and 18). Also discussed was the possibility of delaying the transaction until Rosenthal's divorce was completed. (Exhibits D-12, D-18; R.223, R.226-227, R.229). A corporation permit was also applied for in Paris (Exhibits P-11, D-14, and D-17).

These various discussions concerning a French corporation, or delay until the divorce was completed, consumed the balance of 1958, although shortly after Brangier went to Tahiti in the latter part of May, or early June 1958, he had made application to the Governor of Tahiti for consent to the transfer to Rosenthal (R.116-117), which consent was refused (R.118). Thus, 1958 ended.

Rosenthal went to Tahiti early in 1959, the first of two trips there that year (R.212-213), and on January 29, 1959, he wrote from Tahiti to Brangier in Honolulu that,

> "As I understand it, I may have to go back for the final divorce proceeding in San Francisco so the formation of a corporation or reason for other delays may not be necessary." (Exhibit D-18).

Sometime during the year 1959, Brangier asked Rosenthal to let him have back half of the parcel, since Brangier "had had a change of heart about Tahiti." (R.132-133, R.356). Seven months later, on August 28, 1959, Rosenthal wrote to Brangier (Exhibit D-19) summarizing his (Rosenthal's) intent in acquiring the parcel, and rejecting the idea of selling one-half of the property back to Brangier or of giving Brangier any use of the property.

Brangier responded by letter of September 29, 1959 (Exhibit P-17), stating that he did not feel bound to sell the entire parcel because of the prior verbal agreement, and offering to meet and discuss this with Rosenthal.

On October 30, 1959, Rosenthal, who was again in Tahiti, wrote to Brangier in Honolulu, stating among other things that he was going to try to have a "ready-to-go procedure" after discussion with persons in Tahiti. (Exhibit D-20).

At trial, Rosenthal testified that because no consent from the Governor was forthcoming, or because he thought Brangier was not exerting enough effort, he decided in June or July, or the Fall of 1959, that he would personally take steps to obtain the Governor's consent (R.217-218, Exhibit D-21), and in January 1960, Jean Solari made formal application for consent in Rosenthal's behalf. That application was denied the next month. (R.213-215).

In the meantime, and sometime during 1959, Brangier had suggested the use of a "lease-mortgage with promise of sale"[3/] as an alternative, which alternative Rosenthal wanted

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3/ A "lease-mortgage with promise of sale" is a fairly common (R.119) procedure in Tahiti, whereby a seller gives a buyer a lease of less than ten years' duration, together with a mortgage of the fee title, neither of which require governmental consent (R.29). The seller also promises to convey in fee if and when governmental consent is obtained. In consideration, the buyer pays the fee simple price, gets possession via the lease, and has protection against sale of the fee to a third party via the lien of his mortgage on the seller's title. Lease rent and mortgage interest are equal, and offset each other. (Exhibit P-30, pp.26,33-34).

Jean Solari to handle. (R.119-121, R.175).

On January 29, 1960, Brangier wrote to LeJeune, stating that he would agree to a lease-mortgage arrangement with Rosenthal, with "the full purchase price already agreed upon by Rosenthal and myself to be paid in advance." (Exhibit P-19).

Brangier also specified that Rosenthal "must deposit the balance due me in escrow with Milton Cades[4/] in Honolulu," that "Rosenthal is to advise Milton Cades by cable to prepare the escrow agreement," and that Cades would prepare an escrow agreement for Rosenthal's signature in Tahiti. When Cades received the signed escrow agreement and the check for the balance, he was to inform LeJeune to proceed. (Exhibit P-19).

Brangier sent a copy of this letter to Milton Cades (Exhibit D-22) and a copy to Rosenthal, with a covering letter (Exhibit P-18) stating:

> "The sooner you expedite your end of the escrow the sooner you will be sole owner of a very large beach frontage property. Let Milton Cades know via cable regarding the escrow agreement you are to sign. If you are not in a position to write a check for $25,000, have the money transferred to Cades in some manner." (Exhibit P-18).

Rosenthal never did give Milton Cades any escrow instructions in "the true sense of the word," (R.258), and he never deposited the $25,000 in escrow with Milton Cades. (R.257).

4/ Brangier's counsel in Honolulu.

Rosenthal testified "I don't recall exactly when, but I feel I made repeated attempts to pay it, to indicate that the money was on hand and available at any time, and I certainly did send it to Tahiti in May of 1961." (R.179). He said that "almost immediately" after receiving Brangier's letter of January 29, 1960, he wrote a letter that the money "is available and waiting." (R.198).

The letter to which he referred was his letter of February 10, 1960 to Milton Cades. (R.199). In the letter, (Exhibit D-23), Rosenthal stated that if he did not get the Governor's approval, Brangier's method could be used. With regard to the deposit in escrow under the lease-mortgage, Rosenthal asked Milton Cades, "If possible, I should like to predate [sic] the check and ask you to hold it and advise when to cash. This should coincide with the final signatures..." (Exhibit D-23, emphasis added.)

Prior to this, on February 6, 1960, LeJeune, Brangier's notaire, prepared a "Note" concerning the "sale-transaction," specifying that if the Governor's consent could not be obtained, the parties would use a lease with promise of sale, under which the procedure would be (1) deposit by Rosenthal with Cades of the $25,000 in escrow, (2) notification of payment by letter from Cades to LeJeune, (3) documents sent by Solari to LeJeune, (4) execution by Brangier's attorney-in-fact, and (5) notification to Cades by Solari to release the $25,000 from escrow. (Exhibit P-20).

However, Rosenthal apparently decided to short-circuit this step-by-step procedure by having Solari forward the lease-mortgage papers to Brangier some time between January 29 and February 11, 1960 (R.157-158). On the latter date, Brangier wrote Solari that the unsigned papers had been returned to LeJeune. Brangier stated:

> "My letter of January 29, 1960 to LeJeune and a copy of same to Rosenthal, was very explicit. Before I sign anything Rosenthal must have deposited $25,000 in escrow with Milton Cades. Plus having signed an escrow agreement to be drawn up by Milton Cades and same returned to Cades. When Rosenthal has completed these transactions I will be very willing to sign the necessary papers on the basis outlined in my letter dated Jan. 29, 1960 to LeJeune (copy to Rosenthal).
>
> "In another letter of January 29, 1960, I advised Rosenthal to instruct Milton Cades to prepare the escrow agreement. Procrastination on Rosenthal's part will only delay completion of the transaction." (Exhibit D-25).

Brangier reiterated the terms of his January 29 letter when he returned Solari's lease papers to LeJeune. (Exhibit D-24).

Thereafter, Solari and Rosenthal apparently concluded that a number of problems existed under a lease-mortgage, which Rosenthal passed on to Brangier in Honolulu. (Exhibit D-26). On March 23, 1960, Rosenthal wrote a memorandum to Solari, Cades and Brangier, in which he posed a series of questions concerning any lease-mortgage arrangement. One of the questions he posed concerned the possible use of an agreement to be drawn in the United States and which would be supplemental to the lease-mortgage. Under the U. S. supplement, there would be "protective clauses" relating to such things as will provisions, renewal options, liquidated damages,etc. (Exhibit D-27).

It was now two full years since the contract between the parties had been created.

On May 13, 1960, Rosenthal asked Cades to draw "a rough draft" of the "proposed" supplemental U.S. contract, (Exhibit D-29), and in reply, Cades reminded Rosenthal that it should not be attempted until the parties knew exactly what form the Tahiti documents would take. (Exhibit P-22). Rosenthal was also informed that any such supplemental and private agreement between the parties could not be included in a French contract. (Exhibit D-28, p.2, last paragraph).[5/]

At Rosenthal's request (Exhibits D-31 and D-32), Solari applied for authorization from the French Office of Exchange for permission to make a mortgage.[6/]

Rosenthal then returned to Tahiti, where he remained for the balance of 1960. (R.186). From Tahiti he wrote Cades on September 8, 1960 (Exhibit D-33), stating that the "mortgage arrangement" had been approved, that"the papers" were being prepared there, and that

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5/ This Exhibit -- D-28 -- is Rosenthal's translation of Solari's reply to the questions previously posed by Rosenthal. In it, Solari sets forth the same procedure, in the same sequence, as set forth by LeJeune in Exhibit P-20, back in February, and which Rosenthal had not followed.

6/ At trial, Rosenthal appeared under the impression that the requested authorization was for the transfer of funds into Tahiti (R.180, R. 204-205, R.241-247), rather than of a mortgage itself, as Solari had specified in Exhibit D-28, p.1, fourth paragraph. It is not clear in the first place why Rosenthal thought that payment funds were to ever enter Tahiti.

"...if George wishes his check here, I would give it to him or otherwise send it on to you as previously planned. I trust you will work out a satisfactory U.S. contract with dispatch." (Exhibit D-33).

Shortly thereafter, on September 16, 1960, Cullinan wrote Cades asking for suggestions regarding the supplemental U.S. agreement (Exhibit D-34), to which Cades replied on September 20 that as he had previously stated, he would necessarily have to see the basic French lease-mortgage documents before being able to proceed with the form or content of the private agreement. (Exhibit P-23).

This was apparently passed on to Rosenthal, since on September 27, 1960, he wrote to Cullinan, Cades and Solari that he had asked Solari to extract "the essentials" 7/ from the proposed Tahiti documents, so that "an appropriate supplementary agreement may be completed in the United States, as previously discussed." (Exhibit D-36).

In the meantime, on September 23, 1960, Brangier, who was also in Tahiti (R.356) and knew that the Governor had previously refused Rosenthal's request for consent (R.357), wrote to Mr. Pambrun, the head of the Land Department, "to find out what the status of this tranfer was." (R.357). On

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7/ These "essentials" are reflected in Exhibit P-21, the "summary" of the lease-mortgage procedure. But Exhibit P-21 is not the same as Brangier's procedure stated in January, LeJeune's stated in February, and Solari's stated in April. Unlike all of those, this Exhibit P-21 recites that the operation is to be accomplished first by preparation and presentation of documents, then followed by the payment of money.

the same day, Pambrun returned copies of two February 1960 letters from the Acting Governor of Tahiti to Rosenthal, which set forth the Governor's refusal and reasons therefor. (R.357-358; Exhibit D-35).

Upon receipt of Pambrun's letter with enclosures, Brangier testified that he

> "...decided the situation seemed hopeless. There was nothing forthcoming from Rosenthal or from the French government. I had been waiting two and a half years. So I decided to cancel the deal and came back to Honolulu and wrote Mr. Rosenthal to that effect, offered him the $10,000 deposit that he had left with me." (R.358).

On October 4, 1960, Brangier in Honolulu wrote to Rosenthal in Tahiti, cancelling the agreement and enclosing a check for $10,000. (Exhibit P-25). Brangier recited one of the provisions of Rosenthal's letter of April 25, 1958 and stated,

> "All your efforts during the past two years and a half, as well as my own, to obtain this authorization from the French government have failed. I even learned during my most recent visit to Tahiti that this authorization was officially refused in a letter addressed by the Governor to ...Solari...
>
> "Under these conditions I see no other solution than to resume my freedom of action and to advise you, as I do hereby, that our agreement of 1958 is cancelled and without object or effect due to the impossibility of their [sic] being carried out." (Exhibit P-25).

Brangier also wrote two letters to Jean Solari, informing him of the cancellation and enclosing a copy of the letter to Rosenthal. (Exhibits P-24 and P-26).

After Brangier's notice of cancellation and tender of return of Rosenthal's original deposit, Rosenthal made a new and second formal application for the Governor's consent to a transfer to him in fee simple on October 24, 1960. (R.216).

But apparently even he did not think that such consent could be obtained, because the next day, October 25, 1960, Rosenthal wrote to Brangier, complaining of Brangier's cancellation, and demanding that Brangier complete a lease-mortgage. Rosenthal wrote that before Brangier left, he knew that

> "papers had been prepared for your signature in return for which complete payment was to have been made - all pertaining to our land transaction. Mr. Cades was notified also by letter and was asked where you wished to receive payment, Papeete or Honolulu...I am aware of your efforts to dishonor your agreements with me ... By copy of this letter, I am instructing Milton Cades to prepare an escrow agreement as previously desired by you. Mr. Cades will also receive the $25,000 to be paid to you as soon as the escrow arrangements have been completed..." (Exhibit D-38)8/

With regard to the $25,000 deposit in escrow with Milton Cades, Rosenthal testified that after October 25, 1960 he did "offer to pay the $25,000 balance," and that "there was further correspondence to Milton Cades indicating that the money was available, especially in May of 1961..." Rosenthal stated that Cades was told that the money was "on

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8/ This was the first time in the correspondence that Rosenthal admitted he knew he was required to put the $25,000 in escrow with Cades, and was required to give Cades escrow instructions, both of which were never done. (R.257-258). And the copy of Exhibit D-38 which he recites is being sent to Cades, was received by Cades over two months later, when, on January 9, 1961, Cullinan wrote to Cades, stating "...The balance of $25,000 was made available to us by John, and we have been holding it awaiting escrow instructions in accordance with the enclosed letter, which I was to send on to you, but apparently overlooked doing." (Exhibit P-29, emphasis added; R.349). Cullinan enclosed a copy of Exhibit D-38, as well as a copy of Exhibit P-21, which is the altered "essentials" of the lease-mortgage arrangement. (R.351-352).

hand," and asked whether it should be paid in Tahiti or in Honolulu. (R.183). On cross-examination, Rosenthal testified that he deposited $25,000 with Solari in May, 1961 (R.260), and had an arrangement whereby Cullinan could obtain $25,000 from a broker or banker "at any time" (R.259-260), but that he never deposited the $25,000 with any other person (R.260-262, R.256-257).

Rosenthal testified that the reasons why he did not deposit the $25,000 balance with Bishop Bank or with Milton Cades were: (a) "the initial set-up was impractical and cumbersome;" (b) "a number of unforeseen problems arose" [e.g. Governor's consent and Office of Exchange consent]; (c) he had "somewhat of a misunderstanding that I thought perhaps Milton Cades should prepare the escrow and this could not be prepared until the proper documents had been drawn up in Tahiti...", which he thought, proved true; (d) "it is not a very good policy ever to have money lying around idle, ...It would be ridiculous to put money up for a month or a year, whatever it might be, just to sit around and not work;" (e) "In my opinion, I was under no obligation to put the money up until the transaction was ready to be completed;" (f) "I think the correspondence indicated that I even went farther than my obligation, I offered it to Brangier any number of times, and he never said he wanted it." (R.283)

As previously stated, after Brangier's notice of cancellation, Rosenthal reapplied for consent to transfer in fee on October 24, 1960 (R.216). Five months later, on March 18, 1961, the Governor gave his conditional consent

to that application. The specific conditions were that at Rosenthal's expense, (a) a public right-of-way four meters wide and running from the highway to the sea be created and granted to the French government, and (b) that a public parking area for ten automobiles at the highway end of the right-of-way be created on the subject property. (Exhibit D-46).

Brangier was notified (Exhibit P-37) of this consent in March or April 1961, but disregarded it because he had "already cancelled the sale." (R.165).

Thereafter, Brangier went to Tahiti and in April began negotiations for the sale of the property to a Mr. Clouzot, a French movie producer previously unknown to Brangier. (R.136-137, R.161). A sale was completed in June (R.161) and Brangier received payment in Honolulu in June or July 1961 (R.138). The Governor's consent to the sale to the Frenchman, Clouzot, was obtained in less than one week. (R.163)

Brangier received $45,000 from Clouzot, plus the fee title to a parcel for which Brangier had previously paid the full fee simple price under a lease-mortgage. The "Lessor" under the lease-mortgage had conveyed title to Clouzot, who passed it on to Brangier when Brangier conveyed the subject land to Clouzot. (R.161-162; R.139-141).

Suit for breach of contract was thereafter instituted by Rosenthal (R.2-6). Brangier's Answer admitted a contract on or about April 24, 1958. (R.22-24). The $10,000 which had been tendered back to Rosenthal at the time of Brangier's cancellation (R.262-263) was paid into

court and subsequently withdrawn by Rosenthal under a no-prejudice stipulation (R.19-21).

At trial, Rosenthal described the property (R.252-254), and testified that his primary purpose was to purchase the property for a residence, although "I wouldn't say that I would have held to it forever." (R.254). This was substantially in accord (R.254) with what he wrote to Brangier on August 28, 1959 (Exhibit D-19) as being his original and continuing intent.

Rosenthal's expert on Tahiti land values was a real estate broker from Papeete named Andre Leontieff (R.284-285).[9/]

Leontieff testified as to the value of the property for use as either a hotel site (R.290) or a 16 or 32-lot subdivision, and that in his opinion the fair market value of the property was one dollar a square foot, or about $186,000 for the whole parcel. (R.292-293; R.301)

On cross-examination, Leontieff testified that the parcel "affords privacy" and in response to a question as to whether the beach is generally accessible to the public, he stated "not at all." (R.321-322).

Neither at the time of his appraisal, nor on his direct testimony did Leontieff know that as conditions to its consent to transfer to Rosenthal, the French government

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9/ As of the time he testified, Leontieff had "not especially" made any arrangements with Rosenthal, and nothing had been said, concerning a fee for Leontieff's coming up to Honolulu to testify, although Leontieff hoped "he will pay my trip, at least." (R.326)

had required the creation of the right-of-way to the beach and the parking area. (R.366). On rebuttal, he testified that such conditions would not change his appraisal, because his appraisal was based upon use of the land either "as a hotel site, or subdivision. In both cases a right, or a road to the sea was necessary anyway, and parking area, too." (R.366-367).

Leontieff went on to testify on rebuttal, "...the beach in Tahiti is public. Three meters, counting from the highest tide is public. So really it isn't a private beach. Then all Tahitians living on the other side of the road, in spite of all rules and laws and regulations, are considered by the Attorney General and the Court, to have the right to pass through anybody's property....So beaches are not really private." (R.367).

The court subsequently asked him "As of now, and as of then, was there a public access?", to which his answer was "No, there wasn't," (R.368), although he thereafter testified "So really there is a public access," (R.369), and after that testified "There is public access for Tahitians, but no public access for people from town just trying to get to the beach..."(R.369).

In its fifty-seven page decision, two and one-half of which relate to damages, the lower court found for plaintiff Rosenthal, and awarded him damages of $40,000, plus interest on the $10,000 deposit from the date of such deposit to the date of withdrawal from court. (R.90).

SPECIFICATION OF ERRORS

1. The trial court erred as a matter of law in failing to find that the contract of the parties was of uncertain duration, and could be terminated at any time by either party after a reasonable time. The court further erred in failing to find that Brangier did rightfully terminate after a reasonable time.

2. The trial court erred in failing to find that the contract of the parties was objectively impossible of being performed, and that performance by Brangier was therefore excused. The court further erred as a matter of law in applying principles applicable to illegality of contract to the facts in this case, dealing with impossibility of performance.

3. The trial court erred in finding that the parties intended a "normal type" escrow. There was nothing in the evidence and there is nothing in the record in any way to substantiate the court's definition of "normal type" escrow, and the court's definition was contrary to the plain words used by and actions of the parties.

4. The trial court's interpretation of Exhibit D-23 was contrary to the plain language of that exhibit and to the actions of the parties.

5. The trial court found and concluded that the document referred to as the "U.S. supplemental agreement" was the same thing as Rosenthal's escrow instructions to be given to Milton Cades. This was wrong on the record. The court erred in so finding and concluding, and based upon

such erroneous finding and conclusion, in thereafter finding and concluding that Rosenthal had attempted to have escrow instructions prepared, that Brangier had delayed and obstructed such preparation, and that Rosenthal had complied with the requirements of the lease-mortgage.

6. The trial court erred in sustaining the objection of plaintiff's counsel to a vital question on impeachment, as follows:

> "Q: In D-41 for identification, or D-42 for identification, or D-43 for identification, in any of those items is the Tahiti property, or your contract with Mr. Brangier mentioned as an asset, a liability, or in any way mentioned?
>
> "A: Well, I don't know. It should have been.
>
> "Q: Then, in other words --"

At this point, objection by plaintiff's counsel was made and overruled (R.274). Defense counsel then proceeded:

> "Q: Mr. Rosenthal, having examined D-41, 42, 43 and D-39, and having stated 'No, it should have been,' do I understand you correctly to mean that if you had prepared those items, you would have included the Tahiti contract; is that correct?
>
> "MR. FLYNN: That is an argumentative question. I don't think it is proper at all under the circumstances.
>
> "THE COURT: Just a minute. Frankly, I don't think it is a proper question, Mr. Conklin.
>
> "MR. CONKLIN: May we be heard, your Honor?
>
> "THE COURT: Yes.
>
> "MR. CONKLIN: I don't think that it is argumentative. I am trying to get an explanation of what he means by, 'No, it should have been.' And I am asking, 'In other words, you are saying that if you had prepared it, it would have been included?' That is my question.

"MR. FLYNN: If the Court please, the witness' answer was 'No, it should have been.' But that whole question was likewise objectionable, and I just presented that to the Court as a part of the problem now facing the Court as to a ruling.

"THE COURT: Well, I will sustain the objection as hypothetical and argumentative." (R.275.276)

7. The court's award of damages was excessive and was based upon an appraisal for a use which was not within the contemplation of the parties and had been specifically excluded from the contemplation of the parties.

ARGUMENT

Summary.

The parties made a contract which did not state a specific time for performance or discharge of the obligations created under it, so that under contract law the contract could be terminated by either party after a reasonable time. The trial court did not take cognizance of or apply this principle of law, although the record shows that Brangier terminated two and one half years after the contract was formed. Brangier gave notice of termination, and Rosenthal did not perform within a reasonable time thereafter.

The court applied principles of law applicable to illegality of contract instead of impossibility of performance of contract, and failed to recognize that it was Rosenthal's status that created the impossibility, which continued through the life of the contract.

The court's definition and application of a "normal type" escrow had no basis in the record and was contrary to the plain language used by the parties, the intent of which was borne out by the parties' actions.

The court's interpretation of Exhibit D-23 as constituting acceptance by Rosenthal of the lease-mortgage offer, and compliance therewith by Rosenthal, was contrary to the very language used in the exhibit and Rosenthal's own contemporaneous and subsequent actions.

The court confused the "U.S. supplemental agreement" with the escrow instructions Rosenthal was supposed

to give to Cades, and that confusion led the court to an erroneous finding thereof, and erroneous findings based thereon.

The court's handling of defendant's attempted impeachment of Rosenthal was inconsistent with substantial justice.

The court's award of damages was excessive, and was based upon a valuation made for use of the property as a hotel or subdivision, both of which uses were not within the contemplation of the parties and were specifically excluded from the contemplation of the parties.

POINT I. THE CONTRACT OF THE PARTIES WAS OF UNCERTAIN DURATION AND THEREFORE COULD BE TERMINATED BY EITHER PARTY AFTER A REASONABLE PERIOD OF TIME.

The trial court failed to apply or even consider the basic rule that where a contract is indefinite as to time of duration, it is terminable at will after a reasonable time, and where the parties fix no time for the performance or discharge of obligations created by the contract, they are assumed to have had in mind a reasonable time. Grand Lodge Hall Ass'n v. Moore, 224 Ind. 575, 70 N.E.2d 19 (1945), affirmed 330 U.S. 808, 67 S.Ct. 1088, 91 L.ed.1265.

Perpetual contracts are not favored in law, and a contract construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language in the contract. Freeport Sulphur Co. v. Aetna Life Ins. Co., 206 F.2d 5 (5th Cir. 1953).

In the case at bar, neither Brangier's offer (Exhibit P-3) nor Rosenthal's acceptance (Exhibit P-6) speci-

fied a time for performance, although the language of Exhibit P-3 indicates a period of about one month as somewhere near the then-believed maximum.

In a month's time, however -- indeed, for the rest of 1958 -- Rosenthal wanted to delay and stated he wanted to delay any conveyance of the land, irrespective of whether the French Government consent could be obtained, because he wanted to keep the Tahiti property as his separate property and not have it included as community property in his pending divorce. (R.218-223, 226-229, 235-237, Exhibits D-3, D-7,8&9, D-11&12).

Although Rosenthal was supposed to deposit the $25,000 balance in escrow with Bishop Bank "in about three week's time" from April 16, 1958 (Exhibit P-3), he did not do so, and never did. (R.256-257).

In the meantime, Brangier ascertained that the Governor of Tahiti would not consent to the transfer to Rosenthal (R-116-118), although Brangier in July, 1958 did not yet consider that the consent would be impossible to obtain. (Exhibit P-11).

This state of affairs continued through 1958 and into early 1959, at which point Rosenthal wrote Brangier that since the final divorce hearing was coming up, "the formation of a corporation or reason for other delays may not be necessary." (Exhibit D-18).

Thus, when the "as much as a month" contract (Exhibit P-3) was about one year old, the situation was that Rosenthal had long since breached the contract by failing to comply with the specific provision requiring the

$25,000 to be deposited in escrow with Bishop Bank, but Brangier by conduct had apparently acquiesced by not objecting to the delays prompted by Rosenthal's marital troubles.

However, by the middle of 1959, Rosenthal, his marital problems evidently concluded, no longer desired any further delay. (R.172; R.212-213; R.217-218). But Brangier was still unable to obtain the Governor's consent. This inability continued through the remainder of 1959 (R.123), clearly a period longer than a "reasonable time" of a month or so as originally contemplated by the parties.

If it is argued -- ignoring the concept of objective impossibility -- that Brangier was now in default, any such default was waived by Rosenthal because Rosenthal himself took over from Brangier and took it upon himself to try to obtain the consent, beginning not later than the Fall of 1959 and continuing until 1961. (R.172, 212-213, 217-218).

Moreover, it is to be remembered that the consent could not be obtained because of Rosenthal's nationality, not Brangier's; the defect was in Rosenthal, not Brangier. See Wischhusen v. American Medicinal Spirits Co., 163 Md. 565, 163 Atl. 685 (1933).

The trial court did not grasp the significance of these facts, and did not realize that Rosenthal, beginning in 1959, waived any breach by reason of Brangier's inability to obtain the needed consent.

Therefore, not later than the Fall of 1959, this contract was again eligible for measurement against the

"reasonable time" yardstick. Brangier terminated on October 4, 1960 -- the tenth month of the year after that, and two and one half years after the contract had been created. This clearly was more than a reasonable time, and Brangier was legally entitled to terminate when he did.

Some courts, while agreeing that such a contract is terminable at will, state that upon termination reasonable notice should be furnished the other party, Green v. Obergfell, 121 F.2d 46 (D.C. Cir. 1941), but such notice need not be formal so long as definite and unequivocal, and such notice is unnecessary where the other party has refused to perform. 17A Am.Jur. Contracts, §435.

Because of Rosenthal's refusal to deposit the balance due in any way, shape or form (R.256-258) before Brangier terminated, notice of termination by Brangier would therefore seem to have been unnecessary. But in any event it is submitted that Brangier did give such notice -- by his letter of October 4, 1960 to Rosenthal, cancelling the contract and returning Rosenthal's deposit (Exhibit P-25).

The trial court tacitly recognized that Brangier might have a right to terminate (R.83), but only upon the giving of notice, said the court, and a reasonable time for Rosenthal to make the deposit in escrow.

It is submitted that Brangier did this by his letter of termination, and Rosenthal knew it, because on October 25, 1960, three weeks after termination, Rosenthal wrote to Brangier stating -- unequivocally for the first time -- that Milton Cades would get escrow instructions and would get

the $25,000 to be held in escrow. (Exhibit D-38).

But Rosenthal never did give Cades escrow instructions (R.258), much less deposit the money.

Rosenthal did get a "consent" of sorts in March, 1961, five months after Brangier's notice and tender. The trial court did not consider whether this was or was not an unreasonable time.

In Doering v. Fields, 187 Md. 484, 50 A.2d 553 (1947), a sales contract contained a provision that the cash balance was due in 45 days, but time was not stated to be the essence of the contract. Time passed, and the seller notified the buyer that if the cash was not presented in ten days, the seller would cancel. More than ten days passed, and then the buyer tendered the money. Held, the buyer was not entitled to specific performance, the court stating that the recited period of 45 days had some meaning -- it meant about -- and that because time was not of the essence did not mean that the passage of time would not affect the contract at all.

So also in this case. The contract contemplated a period of "as much as a month", with the deposit of the balance to be due "in about three week's time." (Exhibit P-3). But the contract dragged on for two and a half years before termination, and five months after such termination was more than a reasonable time for Rosenthal's compliance under the circumstances.

No matter what else, Brangier clearly did not intend the contract to go on, and his land to be tied up and

"lying idle", for 2 1/2 years plus five more months, any more than Rosenthal intended (or allowed) his money to be "lying idle" for such a period. The contract had existed for much more than a reasonable time, so that Brangier was entitled to terminate when he did.

Because the lower court failed to recognize or apply the principles relating to termination of contracts indefinite as to time, the Judgment of the court must be reversed.

POINT II. PERFORMANCE BY BRANGIER WAS EXCUSED BECAUSE OF OBJECTIVE IMPOSSIBILITY.

In considering the question of impossibility of performance, the trial court has committed prejudicial, reversible error of law.

On page 46 (R.79) of its Decision, the lower Court stated that even though land transfers effected without consent would be void under French law, such would not affect the validity of the parties' executory contract for such transfer. Also, said the court, the contract validity would not be affected by the impossibility of obtaining such French consent. (R.79).

Appellant agrees. But, so what? The court's statement is irrelevant. The court has applied principles concerning illegality of contract in a case -- this case -- which concerned impossibility of performance of a valid contract. The lower court completely missed the point of law involved, namely, that performance of a contract is excused where impossibility exists. Dorsey v. Oregon Motor Stages, 183 Ore. 494, 194 P.2d 967 (1948).

The court applied wrong law -- the law of illegality of contracts -- to the facts before it, which facts clearly indicate an objective impossibility of performance.

What are these facts? Both Brangier and Rosenthal knew that the Governor's consent to the transfer was necessary. (R.363). That consent was itself in fact impossible to obtain: Brangier could not get it (R.123), and Rosenthal, who tried from 1959 to 1961, could not get it. (R.172, 212-213, 217-218). The "consent" that Rosenthal did finally obtain in March, 1961 was not a consent to transfer of Brangier's parcel but was of a parcel mutilated, for Rosenthal's purposes,[1/] by having a public right of way and a public parking lot carved out of it.

As stated by the Second Circuit:

> "...Where the external circumstances present a case for the fair operation of a rule excusing performance, that shall not be denied unless the fault in not providing against it seems clear and unilateral." Jackson & Co. v. Royal Norwegian Gov't., 177 F.2d 694, 699 (2d Cir. 1949).

In the case at bar, was Brangier at fault in not providing for the contingency of refusal of consent? On the record, he was not.

In the first place no one is presumed to contract

1/ Rosenthal's primary purpose and intent was to purchase the property for a residence (R.254), in a "fairly exclusive" area, "the finest area in Tahiti" (R.252-253), "...a large piece of property in Tahiti on the beach, unspoiled, undeveloped and adequate for privacy..." and Brangier's (not the carved) lot "...will give me the privacy I desire..." (Exhibit D-19).

against the acts of sovereignty. See Village of Minneota v. Fairbanks, Morse & Co., 226 Minn. 1, 31 N.W.2d 920, 925 (1948).

In the second place both Brangier and Rosenthal knew that the consent was required. This knowledge on the part of both parties charged the contract with the implied condition that consent could be obtained.

Thus, in Johnson v. Atkins, 53 Cal. App.2d 430, 127 P.2d 1027 (1942), plaintiff and defendant contracted for defendant's purchase of 500 tons of copra for delivery in Columbia from San Francisco. After shipping of and payment for 200 tons, the defendant learned that further permission for entry of copra into Columbia had been either cancelled or denied by the Columbian authorities. Held, the contract was terminated because of frustration of purpose. The court stated:

> "Where from the nature of the contract and the surrounding circumstances the parties from the beginning must have known that it could not be fulfilled unless when the time for fulfillment arrived, some particular thing or condition of things continued to exist so that they must be deemed, when entering into the contract, to have contemplated such continuing existence as the foundation of what was to be done; in the absence of any express or implied warranty that such thing or condition of things shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without default of either of the parties." Id at 1028.

See Dorsey v. Oregon Motor Stages, 183 Ore. 494, 194 P.2d 967 (1948).

Here, upon the statement of Brangier's attorney in Tahiti (Exhibit P.5), Brangier assumed that the consent

could be obtained, and so informed Rosenthal (Exhibit P-1), since the transaction was between two foreigners and would not involve more French land falling into the hands of such foreigners. (Exhibit P-5).

These facts also served to excuse Brangier's performance. Thus in Williams Grain Co. v. Leval and Co., 277 F.2d 213, 215 (8th Cir. 1960), the court stated:

> "...In the event of some happening which could not have been guarded against or the occurrence of something which would not ordinarily have been anticipated and therefore contractually excepted to and this without fault on the part of the party to be charged, the breach of performance is excused and no damages are recoverable by reason thereof."

In the third place, the fact that the contract was subject to the implied condition of French consent is shown by Rosenthal's letter of April 25, 1958 (Exhibit D-2), wherein he stated that if, for any reason, the sale as contemplated was not completed, then all sums were to be returned to him. It is also shown by Rosenthal's concern with title (Exhibit D-1), and by the fact that Rosenthal himself in 1959 took over the efforts to try to obtain the consent.

But the trial court did not even consider these facts or the applicable principles concerning impossibility of performance of a legal contract.

However, at another place in the Decision, the trial court stated:

> "Actually, there was here no true impossibility of performance by Brangier, since he was able to convey, and Rosenthal was willing to accept, the

lesser title under a lease-mortgage arrangement." (R.67). 2/

The legal validity of this statement is debatable. See Landa v. Schmidt, 362 Mich. 561, 107 N.W.2d 816, 820 (1961). Moreover, the court's statement assumes that the "willing" Rosenthal had accepted the lease-mortgage.

The facts in the record show just the contrary.

Brangier offered Rosenthal a lease-mortgage in January, 1960 (Exhibit P-19), upon the express condition that the full agreed purchase price was to be paid in advance by deposit in escrow with Cades.

Instead of an acceptance, Brangier shortly thereafter received from Jean Solari, Rosenthal's notaire, a lease-mortgage document for his signature. (R.157-158). Thus, by tendering the document in response to Brangier's offer of "put up the money and then I'll sign a lease-mortgage", Rosenthal made a counter-offer of "sign first, with money later". This counter-offer of course acted as a rejection of Brangier's offer. Brangier in turn rejected the counter-offer and reiterated the requirement of cash in advance (Exhibits D-24 and 25).

Moreover, and at almost the same time that the lease-mortgage was being tendered to Brangier, Rosenthal wrote to Milton Cades (Exhibit D-23), saying that he would

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2/ Just six lines earlier in the Decision, the court stated that Rosenthal was apparently willing to accept the lesser title. However, it is assumed for argument that the court found that Rosenthal was willing.

like to give Milton Cades a check for the balance, for Milton Cades to hold and cash only when Rosenthal so advised, which "should coincide with the final signatures" -- again, not constituting payment in advance, as had been specified. This was not an acceptance in the terms of the offer. It was a counter-offer.

Thereafter, at no time before Brangier terminated did Rosenthal ever accept the lease-mortgage. There was no meeting of the minds.

Rosenthal was as busy as a bee, but he never accepted. He did the following: (1) dickered and stalled because of "problems" (Exhibit D-26), then (2) fired off a memo posing a series of legal questions and proposing a supplemental U.S. agreement which was to show the true purpose and was to be kept secret from the French authorities (Exhibit D-27), then (3) asked Milton Cades for a "rough draft" of the "proposed" U.S. supplemental agreement "for the exchange of this property" (Exhibit D-29),(emphasis added), which language puzzled both Milton Cades and Brangier (Exhibit P-22), then (4) forwarded to Milton Cades the answers given him by his notaire and asked for a draft of the supplemental agreement as "outlined in your letter of May 18th" (Exhibit D-30), although Cades' letter of that date (Exhibit P-22) contained no such outline, then (5) ordered Solari to obtain French approval for the entry of dollars into Tahiti (R.180, 204-205, 241-247, Exhibits D-31 and 32), but Heaven knows why, since payment under the contract or the lease-mortgage offer was to be in Honolulu and not Tahiti,

and then (6) went to Tahiti. (R.186).

This all took about seven months. Brangier's letter offering the lease-mortgage was written on January 29, 1960, Rosenthal's two counter-offers were made within two weeks thereafter, and Rosenthal went back to Tahiti in August or September, 1960. In the meantime, of course, Brangier had nothing, which had been going on for two years.

From Tahiti, Rosenthal wrote to Cades on September 8, 1960 (Exhibit D-33), telling Cades that the "papers" were being prepared "and if George wishes his check here, I would give it to him or otherwise send it on to you as previously planned." Sometime thereafter but still during the month of September, Rosenthal again had lease-mortgage papers presented to Brangier, who would not sign them. (R.147-149).

Shortly before Brangier terminated, he came back to Honolulu (R-149), from where he wrote his letter on October 4, 1960 terminating the contract. (Exhibits P-24 & 25).

From the foregoing it can be seen that Rosenthal never accepted the lease-mortgage arrangement offered by Brangier. Three weeks after Brangier terminated, Rosenthal wrote Brangier purporting to say that he would hold Brangier to the lease-mortgage, and that Cades would get escrow instructions and the $25,000 balance (Exhibit D-38), but this was after Brangier had terminated; at no time before Brangier terminated was Rosenthal willing to accept the lesser title. And Rosenthal never did send either money or escrow instructions to Cades, at any time. (R.257-258).

Another vital point which the court did not con-

sider is that the impossibility was caused by Rosenthal's status, by his citizenship, and not Brangier's.

In this respect, the case of Wischhusen v. American Medicinal Spirits Co., 163 Md. 565, 163 Atl. 685 (1933), is squarely in point. In that case, plaintiff was hired as manager of defendant's distillery on a one-year contract. As plaintiff knew before he contracted, defendant had applied to the United States Government for a permit to distill, but the permit had not yet been granted. One month later, the Government informed defendant that plaintiff was unsatisfactory, and that the permit would not be granted so long as plaintiff was employed. Defendant terminated plaintiff, who sued. The court held that the defendant was excused by impossibility.

Here, the consent to transfer to Rosenthal unexpectedly could not be obtained because of Rosenthal's citizenship, and Brangier was excused from performance. Restatement of Contracts §458, comment b. 6 Corbin on Contracts §1351. The impossibility was of uncertain duration, and performance was excused. 6 Williston on Contracts (rev.ed.) §1938; 6 Corbin on Contracts §1348.

Stand in Brangier's shoes as of October 1960, when he cancelled: He had been waiting 2 1/2 years. Nothing was forthcoming. The Governor would not consent. Rosenthal would not put up the money. The future appeared no different. So he terminated. In fact and law, his performance was excused.

In conclusion, (1) the court did not understand or

apply the law of impossibility of performance, (2) Rosenthal never "accepted" the lesser title offered by Brangier until after Brangier terminated, and the good faith of this purported acceptance is highly suspect, since Rosenthal knew all along what the conditions were, and even after his purported acceptance he still never put up the money, and (3) it was Rosenthal's status that made the consent impossible for either Brangier or Rosenthal to obtain.

For failing to so find the trial court erred, and the Judgment must be reversed.

POINT III. THE COURT'S "INTERPRETATION" OF THE ESCROW PROVISIONS OF THE CONTRACT HAD NO FOUNDATION IN THE RECORD.

A. The "normal type" escrow.

Brangier's offering letter (Exhibit P-3) stated the very plain condition that Rosenthal was to put the balance of $25,000 in escrow with Bishop Bank. Rosenthal accepted those terms by Exhibit P-5, and so testified. (R.193-197).[3/]

3/ Despite Rosenthal's testimony that he "presumed" this was the contract of the parties, which was as alleged by the Complaint (R.2-6), admitted in the Answer (R.22-24), an admitted fact in the Pre-Trial Order (R.27-33), and so stipulated, during trial (R.190-191), the court said that it was not. The court stated that "P-6 was not intended to be the actual agreement between the parties", and that in addition to Exhibit P-3 (the offer), P-6 had to be "construed" and "controlled" by P-1, P-2, P-4, P-5, and D-1. (R.43).

Rosenthal knew that the deposit in escrow was a condition of the contract and that he was supposed to make the deposit in escrow, because in Exhibit D-2 he stated "this sum is to be deposited by me at the Bishop National Bank of Hawaii, to be delivered to you upon delivery to the bank" of a letter showing title in order, and of a deed.

Also, in Exhibit P-4, Brangier reminded Rosenthal "When you transfer the $25,000 to the Bishop National Bank, send it 'Attention: Mr. Y. Taylor, Collection Department.'"

Rosenthal continued to recognize this as a condition, because in "about three week's time" he did compose a letter to the Bank (Exhibit D-5), wherein he recited "In connection with the sale of certain property in Tahiti from Mr. George Brangier to me, I am depositing with you the sum of $25,000.00." (emphasis added). And, Rosenthal did send that letter "Attention: Mr. Y. Taylor", as Brangier had instructed.[4/]

However, in its Decision, the trial court stated (R.38-39) that the parties did not intend what they each had said. Rather, said the court, they intended a "normal type" escrow, involving a simultaneous exchange of title papers and money. [If so, why even bother to have an escrow?]

This interpretation of a "normal type" escrow appears a number of other times in the court's Decision

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4/ Of course, he never sent either the money or the original of D-5 to the Bank. (R.256). Presumably Vincent Cullinan, Rosenthal's attorney, upon whose stationery D-5 was written, still has custody of the original of D-5.

(R.41, 45, and 83). But there is not one shred of evidence as to what a "normal type escrow" consists of.

The court also stated that the parties intended a simultaneous exchange of title documents if any, because Brangier had said that Rosenthal was wealthy and "a very fine person" so that there would be no reason, said the court, for Brangier to want his money in advance. (R.41), but this is guesswork by the court and is unfounded in the record. Moreover, the court completely ignores the facts in the record that Rosenthal was in a divorce and property fight with his wife, making it more likely that Brangier would want to have the money in escrow so that the wife could not attach it.

Thus the court without any foundation whatsoever in the record decided what a "normal type escrow" was and ignored the plain meaning of the words used by the parties. It is even highly debatable that the Court's definition of "normal type escrow" is correct, since there are many cases dealing with escrows where the whole purpose of the escrow was to deposit money in advance, see Brant v. Bigler, 22 Cal.Rptr. 539, 208 P.2d 47 (1949); Cook et ux v. Nordstrand, 83 Cal. Rptr. 188 (1948) 188 P.2d 282; Hastings v. Bank of America NT&SA, 79 Cal. Rptr. 627, 180 P.2d 358 (1947) and for the further reason that modern definitions of the term "escrow" point out that it generally means a written instrument so deposited, although it can be applied to money deposited and to be held until the performance of some event. 30 C.J.S., Escrows §3, Nash v. Normandy State Bank, 201 S.W.2d 299 (Mo. 1947).

A deposit of the money is what the parties intended, this is what they repeated, and this is what they knew -- yet Rosenthal never complied.

Rosenthal sent the copy of Exhibit D-5 to Brangier, saying that if it was satisfactory with Brangier, Brangier was to pass it on to the bank. But Brangier did not have the original, or the money to be deposited -- all he had was his copy, which he showed to the bank official (R.354). The court commented that Brangier never "formally accepted and agreed to the proposed form of escrow letter" (R.48), which the court seemed to think was a requisite on Brangier's part.

But there is nothing in the record that shows or even intimates that Brangier was required to "formally accept and agree". He had a copy. He alerted the bank official, period. The burden was on Rosenthal and he knew it. Yet he never complied. The court's interpretation of the escrow condition therefore flies in the teeth of the plain words used by the parties, and which they carried out by their actions. On the other hand, the court's interpretation has no basis in the record. 5/

5/ At one point in its Decision, the court stated that Brangier was in a fiduciary position toward Rosenthal, and had a fiduciary duty to do what was most beneficial for Rosenthal (R.51), and that Brangier breached his fiduciary duty! (R.52).

B. The lease-mortgage escrow.

In January 1960, almost two years after the original contract, the idea of a lease-mortgage was proposed by Brangier (R.119-121). Again still trying, Brangier specified that the $25,000 balance due must be deposited in advance and in escrow, this time with Brangier's attorney Milton Cades.

Again, Rosenthal failed to ever deposit the money in escrow with Cades or to give Cades escrow instructions. (R.257-258). Again, said the court, (R.83) this was not mandatory, and nothing was intended except the "usual" escrow agreement calling for simultaneous exchange.

The court also stated that "it is significant... that Brangier sets no time limit upon the making of the deposit." (R.65). However, as an examination of Exhibit D-32 will show, Brangier tells Rosenthal to let Cades know via cable regarding the escrow agreement and also says "the sooner you expedite", the sooner Rosenthal would be the owner. This language directly contradicts the court's inference that because no time limit was specified, Rosenthal could make the deposit in escrow any time into perpetuity.

The court made much (R.74) of Rosenthal's testimony (R.198-201) that he offered to put the money in escrow "many" times.

But offering to put in escrow is not the same thing as putting in escrow which was the contract requirement.

C. The "Lying-idle" concept.

Rosenthal testified that the deposit of the money

in escrow was "rather a meaningless arrangement" (Exhibit P-30,p.13), and "was impractical and cumbersome" (R.283), and Rosenthal did not put the money in escrow because he did not want it "lying around idle." (R.283).

The court swallowed this excuse hook, line and sinker. (R.39-41). The reasoning is completely fallacious and the court's position entirely wrong. In the first place whether or not it would be "useless" to have the money "lying idle" is irrelevant. It was a condition of the contract and the lease-mortgage concept, and Rosenthal knew it. It was a condition imposed for the Seller's protection, whether idle or not, and the buyer was not obligated to accept it. But he did.

In the second place, to prevent its "lying idle" is why one has escrow instructions -- the depositor can provide, as a part of his instructions, that if the anticipated event does not occur in manner or at the time specified in the instructions, the escrow is revoked. Indeed the escrow instructions could in addition require the escrow holder to place the escrow money in some interest-bearing deposit. But Rosenthal never gave any such escrow instructions -- he never gave any at all.

In the third place, the "lying idle" idea completely ignores the effect of this long continuing contract upon Brangier. Brangier's land was "lying idle" during this entire period. The court relies on its "lying idle" concept as an excuse for Rosenthal's non-performance but does not

even consider that for 2 1/2 years Brangier is in a position whereby he can do nothing with his land, and it is lying idle, unless and until he terminates.

Because there is nothing in the record to show of what a normal type escrow consists, because there is nothing in the record to substantiate the court's assumption that the parties "intended" the court's definition of a "normal type" escrow, and because the words of the Contract were not taken by the court according to their plain meaning and as followed by the parties, the Judgment below must be reversed.

POINT IV. THE COURT'S FINDING THAT BY EXHIBIT D-23 ROSENTHAL "COMPLIED" WITH THE TERMS OF THE LEASE-MORTGAGE IS CONTRARY TO THE VERY LANGUAGE USED IN THAT EXHIBIT.

Despite Rosenthal's own admission that he never gave Milton Cades any escrow instructions (R.258) and never deposited the $25,000 balance with Milton Cades (R.257), the lower court found that Rosenthal did comply with the provisions of the lease-mortgage, by way of Exhibit D-23. (R.69).

The court stated that Exhibit D-23 "in effect"... "impliedly" authorized Milton Cades to proceed with drawing a "satisfactory" escrow agreement, which "left the next step up to Milton Cades." (R.69).

The court's language that Exhibit D-23 in effect and merely by implication authorized Milton Cades to proceed, shows in and of itself that the court did not have any basis from the words used in the exhibit to substantiate its finding.

The court failed to state how Milton Cades was to

proceed on the basis of Exhibit D-23, which ran very contrary to the terms of Brangier's letter of January 29, 1960 (Exhibit P-19), nor does the trial court state to whose satisfaction Milton Cades was to draw this nebulous "satisfactory" escrow agreement -- Brangier's, or Rosenthal's.

The court seized upon Rosenthal's statement in Exhibit D-23 that he wanted to send a check "predated" -- i.e. said the court, a check dated before the date of consummation. The court ignored Rosenthal's qualifying words in the very same sentence that the check was not to be cashed until Rosenthal so advised Milton Cades.

Actually, the Court ignored the language and meaning of the whole of Exhibit D-23.

In that Exhibit, Rosenthal wrote from Tahiti on February 10, 1960 to Milton Cades. Rosenthal stated that he had seen the Governor and hoped to get his immediate approval.[6/]

Rosenthal continued that if the Governor again refused consent,

> "...we can use the other method; ... the escrow methods as outlined by Brangiers seem somewhat cumbersome, nevertheless, I can send you a check at any time for the required amount to hold in escrow. If possible, I should like to predate the check and ask if you hold it and advise when to cash. This should coincide with the final signatures. My reasons for this are obvious, ..." (Exhibit D-23).

6/ Although the letter gives the impression that the interview had recently occurred, the interview with the Governor actually had been back in November, 1959 (Exhibit D-21), and the matter of his consent or approval was not discussed by Rosenthal. (R.214-215).

In the same letter Rosenthal stated several different contingencies he wished to be protected against "in the event of lease-sell agreement." (Emphasis added).

As Rosenthal's letter so plainly shows, he did not accept the lease-mortgage arrangement. He is telling Milton Cades that if the lease-mortgage is used, he can send -- not he will send or is sending -- a check for the $25,000. And, he goes even further: he says he wants to send a pre-dated check, which Milton Cades is not to cash, but is to hold and wait for Rosenthal's instructions as to when to cash it, which, says Rosenthal, should be when the lease-mortgage is signed.

Thus, although Brangier had specified in Exhibit P-19 that Rosenthal was to deposit cash 7/ to be paid in advance, under escrow instructions, Rosenthal was replying with something very different: If I take it, payment is deferred. Rosenthal did not accept Brangier's terms, did not deposit the money (much less a check), and did not give any escrow instructions. In fact and law, Rosenthal's letter (Exhibit D-23) was a counter-offer and not an acceptance.

The English language can be stretched, but the use

7/ Brangier told Rosenthal, "If you are not in a position to write a check for $25,000, have the money transferred to Cades in some manner." (Exhibit P-18, emphasis added). Rosenthal of course knew he was supposed to put up cash, and was trying to depart from the requirement by putting up a check (which could be stopped at any time) to be held until Cades was told "when to cash."

of the phrase "in effect, impliedly" does not provide a court with a license to distort the language into something that it flatly does not say and does not mean.

The court's finding was erroneous and assumed out of thin air. The court used the erroneous finding as a basis for further erroneous findings that because Exhibit D-23 was compliance, Brangier's refusal to sign lease-mortgage papers amounted to "purely dilatory tactics" (R-70), and the court went down the garden path to further erroneous findings regarding the "U.S. supplemental agreement" discussed in POINT V, and to the court's eventual erroneous finding that Brangier had breached but Rosenthal had not.

The Judgment of the lower court must therefore be reversed.

POINT V. THE "U.S. SUPPLEMENTAL AGREEMENT" DID NOT REFER OR RELATE TO THE ESCROW INSTRUCTIONS WHICH ROSENTHAL FAILED TO GIVE TO CADES.

The lower court found that the "U.S. supplemental agreement" was the same thing, the same document as the escrow instructions Rosenthal was supposed to give to Milton Cades (R.71, 72, 75, 81-82).

This finding is clearly and prejudicially wrong.

As the record shows, on March 23, 1960, Rosenthal wrote a memorandum presenting a series of questions, in which he broached the use of a "contractual agreement in the United States" under which Brangier would promise to will the property to Rosenthal, as well as include "other clauses concerning" lease renewals, an option, liquidated damages,

and "other protective measures" for "continuous leasing" and prohibiting sale (Exhibit D-27).

This proposed document was variously referred to in subsequent correspondence,[8/] but the references all related to the same thing: A proposed contract to be executed by the parties in the United States and not part of the French lease-mortgage papers, and which would contain provisions to be (but not yet) agreed upon relating to death, renewals, currencies, damages, etc.

This is perfectly clear from those exhibits, but the court found that the "U. S. supplemental agreement" was the same thing as the escrow instructions Rosenthal was supposed to give Cades:

The court found that Exhibit P-22 ["supplemental agreement in the United States"] referred to "a proper escrow agreement" to be drawn by Cades (R.71), which along with Exhibit D-29 ["proposed contract to be drawn in the United States"] was conclusive evidence, said the court, that Cades' drafting of the escrow instructions was delayed at Brangier's own instance (R.72).

8/ Exhibit D-28, "conventions concluded in U.S.A."; Exhibit D-29,"proposed contract to be drawn in the United States"; Exhibit D-30, "separate agreement"; Exhibit D-33, "U.S. contract"; Exhibit D-34, "contract between John and George Brangier"; Exhibit D-36, "supplementary agreement ... completed in the United States"; Exhibit P-22, "supplemental agreement in the United States"; Exhibit P-23, "U.S. contract" and "supplemental agreement."

The court further found that Exhibit D-34 ["contract between John and George Brangier"] and Exhibit P-23 ["U.S. contract" and "supplemental agreement"] again showed a deliberate failure by Brangier to give his own attorney "the details of the supplemental agreement which he insists his attorney draft as a condition to depositing the escrow amount with Cades ..." (R. 75), and that Brangier was therefore doing all he could to "prolong and obstruct," while Rosenthal was doing all he "reasonably could" (R.76).

In these various findings, the court built error on error, and continued to do so (R.81-82).

The court's reasoning on R.81 and 82 would be logical if it were based upon a correct understanding of what the U. S. supplement related to. Unfortunately, the court was not correct.

In short, the court went completely off the track in finding and concluding that Rosenthal tried to give "escrow instructions," that Rosenthal did "perform" and that Brangier "delayed," "hindered" and "obstructed" the lease-mortgage arrangement. All of these findings are erroneous because all are based upon the fundamental and prejudicial error made by the court in finding that the "supplemental agreement" was, and referred to the same document as, the escrow instructions to Cades.

Rosenthal never gave Cades escrow instructions, and never accepted the proposed lease-mortgage by word or act. There was no meeting of the minds concerning the lease-mortgage, because part and parcel of it was the "U.S. supplemen-

tal agreement", proposed by Rosenthal, a tentative plan of undecided provisions, and no more.

The erroneous finding that the supplement was synonymous with the escrow instructions was one of the court's bases for its completely erroneous finding that Rosenthal performed and Brangier breached. The Judgment of the lower court must therefore be reversed.

POINT VI. DEFENDANT WAS DENIED SUBSTANTIAL JUSTICE WHEN HE ATTEMPTED TO IMPEACH PLAINTIFF.

During Rosenthal's cross-examination, he admitted that subsequent to April 24, 1958, he was required in his California divorce proceeding to disclose all of his assets (R.273), by filing sworn documents relating thereto. These sworn documents were Exhibits D-39, 41, 42, 43, 44 and 45.

However, as soon as the documents were marked for identification, and before even one question was asked about them, plaintiff's counsel made a number of objections concerning them, primarily upon the basis that because certain answers to interrogatories had been sworn to by Vincent Cullinan and not Rosenthal (Exhibit D-41) they could not be used in any way. A great deal of colloquy was engaged in (R.264-271); the documents were stated by defense counsel to be relevant for impeachment (R.272); the court then allowed questioning to begin, subject to a motion to strike (R.273).

Thereafter, the following occurred in cross-examination, at R.274:

"Q: In D-41 for identification, or D-42 for identification, or D-43 for identification, in any of those items is the Tahiti property, or your contract with Mr. Brangier mentioned as an asset, a liability, or in any way mentioned?

"A: Well, I don't know. It should have been.

"Q: Then, in other words --"

At this point, objection by plaintiff's counsel was made and overruled (R.274). Defense counsel then proceeded:

"Q: Mr. Rosenthal, having examined D-41, 42, 43 and D-39, and having stated 'No, it should have been,' do I understand you correctly to mean that if you had prepared those items, you would have included the Tahiti contract; is that correct?

"MR. FLYNN: That is an argumentative question. I don't think it is proper at all under the circumstances.

"THE COURT: Just a minute. Frankly, I don't think it is a proper question, Mr. Conklin.

"MR. CONKLIN: May we be heard, your Honor?

"THE COURT: Yes.

"MR. CONKLIN: I don't think that it is argumentative. I am trying to get an explanation of what he means by, 'No, it should have been.' And I am asking, 'In other words, you are saying that if you had prepared it, it would have been included?' That is my question.

"MR. FLYNN: If the Court please, the witness' answer was 'No, it should have been.' But that whole question was likewise objectionable, and I just presented that to the Court as a part of the problem now facing the Court as to a ruling.

"THE COURT: Well, I will sustain the objection as hypothetical and argumentative." (R.275-276).

This is what transpired at trial. Now, as an examination of the various exhibits discloses, the existence of the Tahiti land or contract had <u>not</u> been disclosed

by Rosenthal or by his attorney, Vincent Cullinan (who made a preliminary sworn affidavit), although Rosenthal did disclose his ownership of other land contracts in his schedules of assets.

Defense counsel possessed but had not yet disclosed [9] the existence of a sworn ratification by Rosenthal of the answers made by Vincent Cullinan. (Exhibit D-44).

Defense counsel had stated that the whole matter was for impeachment, strictly (R.272), and that the initial documents and questions were preliminary (R.277).

Defense counsel was seeking answers to several questions. Had Rosenthal been lying when he under oath ratified Cullinan's omission of the Tahiti land or contract? If so, would he lie again in this proceeding? Had he been honestly mistaken? Or, had both he and his attorney omitted any reference because they felt they did not have a binding contract with Brangier?

These were the possibilities. They became all the more important when Rosenthal answered, "Well, I don't know. It should have been." (R.274, emphasis added) What

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9/ Defense counsel did tell the court and counsel in chambers, before any questioning had started and while the court was questioning the right to cross-examine Rosenthal on the basis of the Answers to interrogatories to which Vincent Cullinan had sworn, that the court was failing to consider the question of ratification. The court so admitted on the record, and admitted that "it didn't sink in at the time" (R.276-277), and that "perhaps the court wasn't wise enough to catch on to it" (R.278), but the court felt that defense counsel had misled the court (R.278).

did Rosenthal mean by this voluntary comment, made before he realized that defendant knew he had ratified, under oath, Cullinan's answers? Was he compounding a previous perjury?

Defense counsel was entitled to find out, should therefore have been allowed to cross-examine whether Rosenthal had perjured himself in that case, this case, or both of them; whether he had deliberately[10/] omitted any reference to a contract upon which he had already paid $10,000;[11/] or whether the omissions had been made because Rosenthal thought he had no contract.

True, the exhibits themselves were eventually admitted in evidence (R.340), but by that time (the next day - R.302-304), all opportunity to trap, to impeach, or to show inconsistency was lost. You cannot impeach when you are forced to disclose what the impeachment consists of before you even start or get a chance to start any impeaching questions.

The crippling and unjustified restriction upon and refusal to the defendant in this regard is to be contrasted with the wide latitude and "let-it-come-in" attitude of the trial court when plaintiff's witness Leontieff was testifying as to matters which the witness himself said

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10/ In its Decision, the court stated that if Rosenthal intentionally had failed to disclose the Tahiti contract in his sworn schedules, "it was reprehensible." (R.87) It would be perjurous as well as reprehensible. The court never allowed defense counsel to find out whether or not it was intentional.

11/ It is to be noted that one schedule of assets was sworn to by Rosenthal the day after he sent Brangier the

were speculation, hearsay, and guesswork (R.298-299, 306-308, 309-311, 313-317).

The point of the matter is that Rosenthal had made statements under oath on two separate occasions which were inconsistent with his complaint and demand for damages in the present lawsuit. By not allowing defense counsel to find out why, or to find out what Rosenthal meant by his voluntary comment from the stand, the trial court acted inconsistently with substantial justice, particularly when the court then proceeded to say that "if" Rosenthal had intentionally so done, "it was reprehensible"! (R.87, emphasis added).

Admittedly, if the court had permitted defense counsel to establish the inconsistency, possible perjury and whether it was "intentional," from Rosenthal himself on the witness stand, it would have effected Rosenthal's credibility in the court's own opinion.

The court laid heavy emphasis in its decision on its lack of confidence in Brangier's credibility, and in favor of Rosenthal's credibility. The scales tipped on the question of credibility because the court would not allow defendant to try to impeach the opposing party, to try to remove the "if" from the court's qualification "if intentional".

For the foregoing reasons the judgment must be set aside, and defendant granted a new trial.

POINT VII. THE AWARD OF DAMAGES WAS BASED UPON A USE OF THE PROPERTY ENTIRELY CONTRARY TO THE CONTEMPLATION OF THE PARTIES, AND WAS EXCESSIVE.

A. Use of the Property.

The court's award of $40,000 in damages was founded upon its determination that the property had a fair market value of $75,000 as a hotel site or multiple-unit subdivision (R.56-57). There is nothing in the record to show that the parties reasonably contemplated the use of the property as a hotel site or subdivision, which is a necessary requisite to any award of damages for breach of contract, and has been ever since Hadley v. Baxendale. 15 Am.Jur., Damages, §52.

On the contrary, and directly from Rosenthal himself, the record shows that the parties contemplated that the property would NOT be so used.

On cross-examination, Rosenthal described the property as being on a white sand beach with a protecting lagoon, a highly desirable piece of property in a fairly exclusive area, and which would afford privacy. (R.253-254). Rosenthal also testified that his primary purpose was to buy the lot for a residence and so he could have privacy, 12/ although "I wouldn't say that I would have held" to that

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12/ The very thing he would not have had with a fourteen-foot wide public right of way, from the highway to "the finest beach in all Tahiti" (R.253), plus a public parking lot on the parcel and next to the highway. (Exhibit D-46).

purpose "forever". (R.254).

This was substantially in accord with what he said in Exhibit D-19, written August 28, 1959, over one year after the contract had been made.

In Exhibit D-19, Rosenthal stated:

> "My original intent was to buy a large piece of property in Tahiti on the beach, unspoiled, undeveloped and adequate for privacy. This is what I still want." (emphasis added).

Rosenthal went on in that letter to reject the idea of letting Brangier use or have half of the property, and stated that he was not interested in either renting or in close neighbors. He went on,

> "Were I to be interested in commercially exploiting the property I could certainly do so at some future time. ...As you know, I am not interested in a program of this sort at the time and I do not contemplate it in the future. A year ago I turned down offers and inquiries of this nature from other sources." (Exhibit D-19, emphasis added).

Rosenthal thus desired a private residence, with privacy, when he originally contracted. He was not interested in such "commercial exploiting" as a hotel or a 16 or 32-unit subdivision. He was not buying for profit on resale. He wanted a large piece of property, unspoiled and undeveloped.

However, Rosenthal's expert witness imported from Tahiti without prior fee arrangement or discussion (R.326), named Andre Leontieff, testified that in his opinion the property, used as either a hotel site or a 16 or 32-lot subdivision, had a value of $186,000. (R.290, 292-293, 301).

Neither Leontieff nor anyone else testified as to the value of the parcel when used for a private residence.

There is nothing in the record that shows the value of the parcel when used as a private residence, yet this was the use contemplated by the parties at the time they contracted, to the exclusion of any commercial use.

Although the trial court "discounted" Leontieff's appraisal, that appraisal was the yardstick against which the court measured damages. (R.89). The court itself stated that one of the reasons for its reducing Leontieff's valuation was that "certain hotels were not prospering" (R.89, emphasis added), and that another reason for reduction was that a purchaser of lots in a subdivision of the parcel might not be able to get governmental consent. (R.88).

The record contains nothing to show valuation for use as a private residence. Moreover, what would the residential lot be worth when encumbered with a 14 foot public right of way to the beach, plus a public parking lot? This was the only kind of lot that Rosenthal could have received.

True, Leontieff, bless his loyal and unpaid heart, said that such a right of way, "and parking area, too", would not affect the value, because a hotel site or subdivision would necessarily include those items. (R.366-367). But that was not the state of affairs or the land use contemplated when the parties entered into the contract. They contemplated, as the record shows, a use for a private residence, and for a private residence only. Their contemplation specifically excluded the use upon which the court based its award.

The lower court's valuation of the lot and determination of damages is contrary to the law applied to the facts in the record. The Judgment must therefore be set aside and a new trial on damages ordered.

B. The excessive damages.

In and of itself, the $186,000 appraisal by Leontieff was fantastic: Brangier sold to Clouzot,[13] a French movie producer who was previously unknown to Brangier, for $45,000, in May, 1961, (R.161, 294) -- for less than one-quarter of Leontieff's "appraisal" about six months later. Clouzot evidently did not appreciate his fabulous bargain, because at just about the same time (R.298)that Leontieff made his appraisal of $186,000 (R.300), Clouzot sold to a bank for $85,000 (R.304-305) -- less than half of the "appraisal", and after Clouzot had put in $10,000 or $20,000 in improvements. (R.314-315).

The court discounted Leontieff's appraisal to $75,000 "at the time of the breach of the contract in April, 1961"[14] (R.89). One of the court's stated reasons for discounting Leontieff's appraisal was that Tahitians living

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13/ The court called this "the actual and hasty sale to Clouzot in April" (R.89), to show that Brangier in haste gave a bargain-basement price. The sale was in May and not in April, (R.294) and the transaction took about a month or six weeks (R.161) -- i.e., just about the same period of time that Brangier and Rosenthal originally contemplated.

14/ Why that date? Why not May or June, 1958? 1959? 1960?

Another item was the court's allowance of interest upon the $10,000 deposit made by Rosenthal, from the date he made the deposit in 1958 to the date its withdrawal was stipulated in court in 1961.

But the $10,000 was tendered by Brangier on October 4, 1960, and the court itself said that the contract was breached in April, 1961. (R.89). The court thus allowed interest on the deposit prior to the date which the court itself established as the date of breach.

The court admits that a right of way detracts from value, but the record is devoid of any evidence as to the lessening in value caused by a public right of way. The court allowed interest on the deposit for a period of time prior to the date which even the court said was the date of breach of the contract.

The judgment must be set aside and a new trial on damages ordered.

Conclusion.

The whole fabric of the lower court's decision was woven out of unjustified assumptions, erroneous findings of fact and incorrect conclusions of law, which when stitched together present the quilt of a decision superficially whole. But when that fabric is tugged upon and tested for strength against the record and the law, the fabric shreds into rags and tatters.

The court started off on the wrong foot: it did not recognize the legal significance of the fact that the contract was of an indefinite duration and hence was terminable at the will of either Brangier or Rosenthal after a reasonable time. Brangier was therefore entitled in fact and by law to terminate when he did.

The court stayed on the wrong foot by applying legal principles applicable to illegality of contract instead of impossibility of performance of contract, and by failing to recognize that objective impossibility of performance existed and continued to exist.

Without foundation in the record, the court invented the definition of a "normal type" escrow, and plastered that invention over the very words and actions of the parties shown in the record.

The court disregarded Rosenthal's own words and actions with regard to the lease-mortgage proposal, and then went on to incorrectly find that the "U.S. supplement" referred to the same thing as Cades' escrow instructions, whereas in fact as shown by the exhibits in evidence, they were and referred to very different things.

To defendant's prejudice, the court denied defense counsel the opportunity to impeach plaintiff, whom the court then proceeded to find "believable".

The court's award of damages was excessive because it contradicted the court's own findings of matters which

affected value, and the award of damages was incorrectly based upon a use of the property which had been specifically excluded from the contemplation of the parties.

For the foregoing reasons, appellant is entitled to a reversal of the judgment below, or in the alternative to a new trial.

DATED: Honolulu, Hawaii, October 11, 1963.

Respectfully Submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that on October 11, 1963 I served three copies of said brief upon Appellee.

Daral G. Conklin

DARAL G. CONKLIN

APPENDIX A

EXHIBITS

hibit	Record Pages		
	Identified	Offered	Received
P-1	Pre-trial	106	106
P-2	"	"	"
P-3	"	"	"
P-4	"	"	"
P-5	"	"	"
P-6	"	"	"
P-7	"	"	"
P-8	"	"	"
P-9	"	"	"
P-10	"	"	"
P-11	"	"	"
P-12	"	"	"
P-13	"	"	"
P-14	"	"	"
P-15	"	"	"
P-16	"	"	"
P-17	"	"	"
P-18	"	"	"
P-19	"	"	"
P-20	"	338	339
P-21	"	352	352
P-22	"	106	106
P-23	"	"	"
P-24	"	"	"
P-25	"	"	"

hibit	Identified	Offered	Received
)-26	Pre-trial	106	106
)-27	"	338	339
)-28	"	"	"
)-29	350	353	353
)-30	362	362	362
)-1	Pre-trial	106	106
)-2	"	"	"
)-3	"	221	222
)-4	"	106	106
)-5	"	"	"
)-6	"	"	"
)-7	"	"	"
)-8	"	"	"
)-9	"	"	"
)-10	"	"	"
)-11	"	"	"
)-12	"	"	"
)-13	"	"	"
)-14	"	"	"
)-15	"		
)-16	"	106	106
)-17	"	"	"
)-18	"	"	"
)-19	"	"	"
)-20	"	364	364
)-21	"	106	106
)-22	"	"	"

hibit	Identified	Offered	Received
)-23	Pre-trial	106	106
)-24	"	158	159
)-25	"	"	"
D-26	"	339	339
D-27	"	106	106
D-28	"	204	204
D-29	"	106	106
D-30	"	"	"
D-31	"	"	"
D-32	"	206	206
D-33	"	106	106
D-34	"	"	"
D-35	"	362	362
D-36	"	106	106
D-37	"		
D-38	"	146-147	147
D-39	263-266	280	340-341
D-40	"	"	"
D-41	"	"	"
D-42	"	"	"
D-43	"	"	"
D-44	"	"	"
D-45	"	"	"
D-46	332-333	326-327	344
D-47	"	333	"

Stipulated at trial to have been written between July 20 and August 15, 1958 and not in June, as recited in the Pre-Trial Order (R-365).

No. 18,789

United States Court of Appeals

For the Ninth Circuit

GEORGE BRANGIER,
Appellant,

vs.

JOHN B. ROSENTHAL,
Appellee.

BRIEF FOR APPELLEE

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No. 18,789

United States Court of Appeals

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GEORGE BRANGIER,
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Appellee.

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

The Appellant's jurisdictional statement is acceptable.

STATEMENT OF THE CASE

The Appellant's presentation of the Statement of the Case is considered misleading and is controverted. It permits several inferences which a more careful or accurate Statement of the Case would prove to be impermissible. Accordingly, Appellee deems it appropriate to present its own Statement of the Case, which is set forth in the following paragraphs.

As found by the Court (R. 40) the parties were in full accord, and reached a definite and certain meeting of the minds, in April of 1958 for the sale and pur-

chase of certain land in Tahiti owned by Appellant, George Brangier. The agreed price was $35,000.00, of which $10,000.00 was to be paid in cash and was in fact paid in cash within a very short time, and the balance of $25,000.00 was to be paid later, through escrow arangements. (Exhibits P-3 and P-6.) Brangier "estimated" that it might take as long as a month to complete the transaction and "suggested" that the $25,000.00 be sent to the bank in about three weeks time (Exhibit P-3) so as to be available to be paid to him when he would present the deed to the property in Rosenthal's name. (Exhibit P-5.) The form of deed was agreed upon and Brangier likewise agreed to give the bank a letter or statement from Marcel Lejeune (sometimes written LeJeune), Brangier's attorney (R. 46, 117, Exhibits P-19, D-25) described by Brangier as a notary public and lawyer in Tahiti, "informing you that the deed does fully and effectively pass title to you and that it has been recorded". (Exhibit P-3.) In negotiations between the parties Brangier assured Appellee, Rosenthal: "There will be no problem in having the title to my property transferred to your name", and "I guarantee delivery of title of my Tahiti property in your name." (Exhibit P-1.)

A series of problems intervened, so that extensive delays occurred in the bringing of the contract to a conclusion, a "closing" of the deal. (R. 179.) The first problem, and one that continued in existence for approximately two years, was the matter of obtaining the consent of the French government for the trans-

fer. The parties made application to the government of Tahiti for such consent on several occasions, and such consent was ultimately obtained (Exhibits D-46, P-27), but prior to the granting of the same Appellant purported to rescind or cancel the contract of sale. The parties explored different procedural ways of effecting the transfer from the seller to the buyer, and one of the reasons for doing so was the desire of the buyer, Appellee, to establish his anticipated title to the Tahiti property as his separate property, and not community property, as he was at the time engaged in divorce litigation with his wife. (Exhibits D-3, D-6, D-7.) Marcel Lejeune, referred to above, advised Rosenthal "I think it would be prudent for Mr. Rosenthal to retard this transaction until his divorce is final" and he proceeded to suggest a type of interim contract. (Exhibit D-7.) A copy of that advice was sent by Marcel Lejeune to Brangier. (Exhibit D-6.) As discussions, conferences, correspondence and negotiations proceeded, the parties eventually agreed, and the Court so found, to effect the transfer from the seller to the buyer on the basis of an arrangement known or described as "lease-mortgage with promise of sale" (R. 120, 132) and the arrangement was still in effect in August or September, 1960 (R. 141) Brangier having been requested in February 1960 (Exhibits D-24 and 25) and again in September 1960 (R. 148) to execute the papers necessary to carry it into effect. Milton Cades, his attorney, was instructed in February 1960 (R. 69) to undertake the preparation of escrow documents, the parties there-

after discussed certain aspects or procedures for consummating the transaction, and by a copy of Rosenthal's letter of October 25, 1960 to Brangier (Exhibit D-38) Mr. Cades was again asked "to prepare an escrow agreement as previously desired by you. Mr. Cades will also receive the $25,000.00 to be paid to you as soon as the escrow arrangements have been completed."

The "lease-mortgage with promise of sale" method was a practice well known in Tahiti, and an acceptable and lawful way (R. 127), in which transfers could be made from sellers to buyers. The parties then engaged in further discussion, correspondence, conferences and negotiations, concerning the steps necessary to carry through to a conclusion this type of transfer.

At no time was there any intimation by either party of an intention to break off negotiations, nor of an intention to do anything whatever except eventually complete and conclude the sale and purchase. The record shows that the seller, Brangier, even attempted to amend the Agreement (Exhibit P-17) so that only one-half of the property would be sold to the buyer, but he acknowledged the right of the buyer to refuse to make such change and he agreed at the end of January 1960 that the original contract for the sale and purchase of the entire property would be carried out. (Exhibit P-19.) While such procedural steps were being cleared up and ironed out, and without prior notice of any kind, or without demand for performance of any kind on the part of the buyer, Appel-

lee (R. 153-155), the seller, Appellant, purported by a letter dated October 4, 1960 and mailed by Brangier in Honolulu to Rosenthal in Tahiti, to cancel the entire transaction. (Exhibit P-25.)

The attempted concellation of contract was immediately challenged and rejected by the buyer, Appellee (Exhibit D-38), who tendered full payment of the balance due and demanded performance by Appellant. Appellant refused to perform and subsequently sold the property to another party although he knew at the time that the Governor of Tahiti had authorized a transfer of the property to Rosenthal. (Exhibit P-27.) This sale was made at a price said by Appellant to be $45,000.00, or $10,000.00 more than the contract price with Appellee. Evidence was introduced, and found by the trial court to be credible and reliable, which established that the fair and reasonable value of the property at the time of the breach of contract by the seller was $75,000.00, by reason of which fact the Appellee was damaged to the extent of $40,000.00, the difference between such fair value of the property and the contract price. Judgment was entered for such sum, together with interest on the $10,000.00 deposit for the period from the date of making such deposit to the date the same was refunded upon stipulation of the parties.

SUMMARY OF ARGUMENT

The District Court was abundantly supported in its findings by substantial evidence or reasonable inferences therefrom. The contract did not set a time for performance, neither party sought to establish such time, there was no delay beyond a reasonable time nor was there any complaint of delay, and Appellant wrongfully repudiated his contract without notice or demand.

As to damages, similarly as to the findings of fact by the Court with respect to the contract and its breach, there is ample, even abundant substantial evidence to support the District Court's decision.

ARGUMENT

It is deemed appropriate at the outset to direct attention to the fundamental proposition on this appeal. In short, the present inquiry of the Appellate Court is not to see whether it agrees precisely with each and every conclusion of fact, inference from documentary or other evidence, or the findings with respect to credibility of the witnesses, all as expressed in the Decision of the District Judge. Instead, the inquiry is directed to a determination as to whether the findings of the trial judge were "clearly erroneous", as to whether there was any substantial evidence to support them, as to whether the District Court made reasonable choices from among conflicting inferences, and whether the evidence as a whole reasonably tends to support the findings. The following excerpts from

opinions in both Federal and State cases are submitted:

"Where cause was heard by district judge without intervention of jury and judge filed an opinion, including findings of fact and conclusions of law, and findings of fact were not clearly erroneous, and on appeal cause was heard on the transcript of record, briefs and arguments of counsel, the judgment would be affirmed." *Hoge v. Deutsch,* 185 Fed. 2d 259 (C.A. 6, 1950).

"The jury having been waived by stipulations and findings of fact and conclusions of law having been made by the court below, we are limited upon review to the question whether there is substantial evidence to sustain the findings and, if so, we must affirm." *Burkhard Inv. Co. v. United States,* 100 Fed. 2d 642 (C.A. 9, 1938).

". . . when there are conflicting inferences and conclusions, it is the function of the trier of facts to select the one which it considers most reasonable. Yin v. Acme Mattress Co., 40 Haw. 660, 672, 674; Awai v. Paschoal, 43 Haw. 94, 97; Fukuoka v. Dodo, 43 Haw. 337, 340; Sentilles v. Inter-Caribbean Corp., 361 U.S. 107; Behles v. Chicago Transit Authority, 346 Ill. App. 220, 104 N.E. 2d 635." *Dzurik v. Tamura,* 44 Haw. 327, 359 P 2d 164 (1960).

"Where there is conflicting evidence, . . ., the question is one for the trier of fact." and "It is generally recognized that the determination of the trier of fact will not be reversed unless clearly erroneous." *Mitchell v. Branch,* 45 Haw. 128, 363 P. 2d 969 (1961).

"When the construction of an oral contract or of an uncertain written agreement is with the

aid of testimony not unreasonable or inconsistent with the evidence, the conclusion of the trial court will not be disturbed." *Williams v. Denver,* 167 Cal. App. 2d 101, 334 P. 2d 161 (1959).

ANSWER TO APPELLANT'S POINT I

APPELLANT GAVE NO NOTICE OF INTENTION TO TERMINATE AND HE MADE NO DEMAND FOR PERFORMANCE BY APPELLEE.

The period of about one month for completing the transaction was merely an estimate by Brangier himself (Exhibit P-3), and was never thought of by either party as even a suggestion of a time limit. This is demonstrated by the fact that negotiations and discussions as to procedure continued through September 1960 as admitted by Appellant. (R. 127, 165.) Even on April 3, 1961, Appellant's Honolulu attorney was apparently expecting "receipt of the balance of the purchase price." (Exhibit P-27.) It is, therefore, of no significance that in June 1958, shortly after the agreement was entered into, Rosenthal suggested delay as one alternative. (Exhibit D-12.) In this connection, it is necessary to remember that Marcel Lejeune, who was Brangier's notary public and lawyer in Tahiti (Exhibit P-3), advised Rosenthal's attorney in San Francisco that it would be prudent for Rosenthal to retard the transaction until Rosenthal's divorce was final. (Exhibit D-7.) Rosenthal's attitude toward the transaction is best summed up in his own words under cross-examination:

> "I don't believe I have indicated I wanted to delay the transaction. In fact, the opposite, I

wanted to aggressively go forward. But that doesn't preclude trying to find out what can be done." (R. 226.)

Appellant recognizes this on page 24 of his brief.

Brangier's supposition that Rosenthal was to deposit the $25,000.00 balance with the bank in about three weeks was based upon Brangier's own estimate that he would be able to deliver to the bank at about that time

> "a document similar to the photostatic copy that I am enclosing except that it will name you as the owner rather than me. At the same time, I will also give the bank a letter or statement from Mr. Lejeune informing you that the deed does fully and effectively pass title to you and it has been recorded. . . ." (Exhibit P-3.)

Appellant seems to recognize (Brief, p. 25) the principle described in 17A C.J.S., *Contracts,* §435 (incorrectly cited by Appellant as 17 Am. Jur.) as follows:

> "If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so; and where time is not of the essence of the contract he must give the other party a reasonable time thereafter to comply, unless the contract itself dispenses with such notice or unless notice becomes unnecessary by reason of the conduct of the parties. However, notice of intention to rescind is necessary only where a party has merely delayed performance, and not where he has abandoned the contract, or treated it as terminated, or where he has refused to perform. . . ."

There is no evidence in the record that Rosenthal ever abandoned the contract, or treated it as terminated, or refused to perform. Appellant now apparently seeks to interpret his letter of October 4, 1960, sent to Rosenthal in Tahiti (Exhibit P-25) purporting to cancel the contract as notice to deposit the $25,000.00 balance with Appellant's attorney. No such interpretation is possible. Appellant's letter of October 4, 1960, was clearly and unequivocally a repudiation by Brangier of the contract despite the many misstatements which it contains. The Court found (R. 35) that an oral contract of sale was made by the parties, as testified by Rosenthal (Exhibit P-30, page 4, R. 192, 194, 196.) This was confirmed by Brangier's letter of April 16, 1958 (Exhibit P-3) and Rosenthal's letter of April 24, 1958. (Exhibit P-6, R. 196.) Appellant's brief (p. 22) in referring to Exhibits P-3 and P-6 recognizes that the contract was complete not later than April 24, 1958, and that Rosenthal's letter of April 25, 1958 (Exhibit D-2), referred to in Appellant's letter of October 4, 1960, was not part of the contract. Appellant's letter of October 4, 1960, does not ask for $25,000.00 or any other sum of money. It seeks to return Rosenthal's deposit of $10,000.00.

Rosenthal's letter of October 25, 1960, sent to Brangier in Honolulu (Exhibit D-38) reminded him of the fact that Brangier had been advised prior to the time when the letter of October 4, 1960 was written that

> "papers had been prepared for your signature in return for which complete payment was to have been made. . . ."

and continued:

> "*By copy of this letter, I am instructing* (emphasis added) Milton Cades to prepare an escrow agreement as previously desired by you. Mr. Cades will also receive the $25,000.00 to be paid to you as soon as the escrow arrangements have been completed."

Note the words "I am instructing", which Appellant seeks to interpret as meaning that "Cades would get escrow instructions."

In *Doering v. Fields,* 187 Md. 484, 50 A. 2d 553 (1947), cited by Appellant on page 26 of his Brief, the purchasers did nothing until the time fixed for consummating the contract had expired. Only when the seller notified the purchasers that if the money was not paid in 10 days, the seller would cancel, did the purchasers do something—they applied for a loan, which was approved 12 days later. But even after the approval of the loan they were not ready—the title had not been searched and the deed and mortgage still had to be prepared. How different from the case at bar! In our case there never was any notice of *intention* to cancel (R. 187), and there never was any notice to pay the money. (R. 283.) On the other hand Rosenthal was led to believe by Brangier that there was no hurry about depositing the $25,000.00. (R. 283.) Moreover, Rosenthal did not fail to do what he could to consummate the transaction.

ANSWER TO APPELLANT'S POINT II

THERE WAS NO IMPOSSIBILITY OF PERFORANCE AND BRANGIER WAS NOT EXCUSED.

On April 2, 1958, Brangier wrote to Rosenthal "There will be *no* problem in having the title to my property transferred to your name" and "I *guarantee* delivery of title to my Tahiti property in your name". (Exhibit P-1, emphasis added.) It is obvious that when Rosenthal wrote to Brangier on April 25, 1958 (Exhibit D-2) and referred to the possible return of his money he was referring to circumstances that might have arisen in the event of Brangier's death, referred to in the preceding sentence of the same letter. Brangier said the same thing when he wrote his letter of April 15, 1958 (Exhibit P-3):

> "The point remains as to the possibility of death of either of us before this transaction is finally consummated. I would suggest that each of our estates be considered bound to perform. In other words, if I should die prior to the necessary papers coming back from Tahiti to Hawaii and payment by you of the balance due, my executors will be obligated to complete the transaction. If, however, because of my death the Tahitian government refuses to permit the sale, then my estate will return the $10,00.00 to you and the entire transaction will be cancelled."

The Governor's consent to the transfer of title from Brangier to Rosenthal was, in fact, obtained on March 8, 1961 (Exhibits D-46 and D-47) before Brangier disposed of the property to someone else. Prior to the time when such consent was obtained, Brangier offered a lease-mortgage arrangement (Exhibit P-19,

Appellant's Brief, p. 31) which Rosenthal had accepted, as admitted by Brangier (R. 132), and as found by the Court (R. 67), and was attempting to put into effect prior to the time when Brangier sent his letter of October 4, 1960. There was, therefore, no impossibility of performance.

Even if we disregard the lease-mortgage method of consummating the transaction, the most that Appellant could claim was temporary impossibility, a fact contemplated by the parties and which Appellant guaranteed he would overcome. In these circumstances, Appellant is not excused from performance.

The law on this subject is clear. As stated in 17A C.J.S., *Contracts,* §461:

> "A temporary impossibility of performance of a character which, if it should become permanent, would discharge a promisor's entire duty operates as a permanent discharge if performance after impossibility ceases imposes a substantially greater burden on the promisor than that intended by the parties; otherwise, the duty of performance is suspended only while the impossibility exists."

Also applicable is the rule set out in 17A C.J.S., *Contracts,* §463(1):

> "*Permission of government officers.* Where a party enters into a contract knowing that permission of government officers will be required during the course of performance, the fact that such permission is not forthcoming when required does not constitute an excuse for non-performance."

In 17A C.J.S., *Contracts,* §467, the rule is stated as follows:

> "*Legal Impossibility.* The general rule is that performance of a contract cannot be compelled where it would involve a violation of law, or of a governmental order or decree . . . The rule does not apply, however, where the impossibility created by law is only temporary . . . or where the law in question is that of a foreign country and not a domestic law. The inability to . . . secure the . . . consent of a third person whose . . . consent is needed for a performance of the undertaking is not considered a legal impossibility avoiding the obligation, unless the terms or nature of the contract indicate that the promisor does not assume this risk . . ."

Village of Minnesota v. Fairbanks, Morse & Co., 226 Minn. 1, 31 N.W. 2d 920 (1948), cited on page 29 of Appellant's Brief, quotes with approval *Restatement of Contracts* §462 dealing with impossibility of performance. That section reads as follows:

> "Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed on him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists."

Such cases as *Johnson v. Atkins,* 53 Cal. App. 2d 430, 127 P. 2d 1027 (1942), and *Williams Grain Co.*

v. Leval and Co., 277 F. 2d 213 (8th Cir. 1960), cited on pages 29 and 30, respectively, of Appellant's Brief are obviously not applicable. In *Johnson v. Atkins,* the language quoted shows that it was based upon

> "the absence of any express or implied warranty that such thing or condition of things shall exist."

In the case at bar there was an express warranty:

> "There will be no problem in having the title to my property transferred to your name . . . I guarantee delivery of title of my Tahiti property in your name." (Exhibit P-1.)

The quotation from *Williams Grain Co. v. Leval and Co.* is apparently intended to imply that the delay in obtaining the Governor's consent could not have been anticipated by Brangier, and therefore contractually excepted to. Obviously, such an implication is not justified. The holding of the case cited is interesting. The defendant claimed that a shortage of freight cars excused nondelivery of soybeans. The court held (p. 215):

> "Thus, had defendant wished to protect itself against this loss and be relieved of its responsibility under the contract through the happening of this foreseeable event, it could have and should have so provided in the agreement. (Citations) The car shortage is, therefore, unavailing. Consequently, it is unnecessary for us to consider any claimed justification for the defendant's failure to ship the beans when freight cars did become available."

Appellant refers on page 31 of his Brief to the fact that he attempted to impose upon his offer to con-

summate the transaction by the lease-mortgage method a condition which he describes as follows: "that the full agreed purchase price was to be *paid in advance* by deposit in escrow with Cades." Obviously, this was a condition which, as the Court held (R. 67), he had no right to impose. However, even if he did have the right to impose such a condition, no time limit was given for such deposit. As pointed out elsewhere in this Brief, Rosenthal had the necessary documents prepared to consummate the transaction by the lease-mortgage arrangement and offered the balance of the purchase price before Appellant's letter of October 4, 1960, and offered it again shortly thereafter.

Appellant is clearly mistaken when he says on page 32 of his Brief that *"at no time before Brangier terminated did Rosenthal ever accept the lease-mortgage.* There was no meeting of the minds." Appellant himself testified as follows (R. 132):

> "Q. Mr. Brangier, you earlier testified that an agreement was made to enter into the lease mortgage arrangement, the lease with promise of sale arrangement, and that this was made in January or February of 1960; am I correct?
>
> A. Yes, I believe that is right."

It was at about this time that Rosenthal wrote to Cades on February 10, 1960, saying (Exhibit D-23):

> "I have seen the Governor and am hoping to get his immediate approval; this will simplify the transfer. I should know any day. If he says no, we can use the other method; I have discuss (sic) this with both Jean Solari and Marcel Lejeune. The escrow methods as outlined by

> Brangiers (sic) seem somewhat cumbersome, nevertheless I can send you a check at any time for the required amount to hold in escrow."

Rosenthal then inquires of Cades, who is Brangier's attorney, about certain safeguards if the lease-promise of sale (sometimes referred to as "lease-mortgage") method is used. One refers to the obligation of Brangier's estate, referred to as early as April 1958 (Exhibit P-3), and the other relates to insuring against a possible sale by Brangier to a third person. As the Court found (R. 68), these suggestions "were reasonable requests to insure that Brangier comply with his agreement to convey fee simple title, as far as he possibly could, which was his obligation anyway." *Koon v. Maui Dry Goods & Grocery Co.,* 29 Haw. 669 (1927) and same case, 30 Haw. 313 (1928).

Appellant seeks on page 32 of his Brief to ridicule some of Rosenthal's efforts, perhaps to confuse the issues. The problems were not all Rosenthal's. (R. 70.) Appellant says "Heaven knows why" Rosenthal "ordered Solari to obtain French approval for the entry of dollars into Tahiti". (Brief, p. 32.) We suggest that a down to earth reason is found in the following statement: "I was advised by Jean Solari that permission had to be obtained from the Office of Exchange in order to complete the lease-mortgage and promise of sale arrangement." (R. 180.) Appellant also apparently wants to forget about Rosenthal's letter of September 8, 1960 to Cades (Exhibit D-33, quoted below) hoping that it will disappear.

Appellant asserts (Brief, p. 33) that "*at no time before* Brangier terminated was Rosenthal willing to accept the lesser title." Here, Appellant does not interpret the letter of October 4, 1960 as notice of intention to terminate. Compare page 25 of Appellant's Brief. The assertion is erroneous. On September 8, 1960, Rosenthal wrote from Tahiti to Cades (Brangier's Honolulu attorney):

> "The papers are being prepared here and if George [Brangier] wishes his check here, I would give it to him or otherwise send it on to you as previously planned." (Exhibit D-33.)

The letter also told Cades that the government had approved the arrangement and requested Cades to "work out a satisfactory U. S. contract with dispatch." Cullinan (Rosenthal's San Francisco attorney) also wrote to Cades on September 16, 1960 (Exhibit D-34), referred to the government approval of the lease-mortgage plan suggested by Lejeune (Brangier's Tahiti notary and attorney), and asked for suggestions from Cades. Cades replied to Cullinan by letter dated September 20, 1960 (Exhibit P-23) from which it is apparent, as the Court found, that

> "through the deliberate failure of Brangier to give his own attorney the details of the supplemental agreement which he insists his attorney draft as a condition precedent to depositing the escrow amount with Cades and proceeding to consummate his contract, further delay is engendered." (R. 75.)

Rosenthal followed through on September 27, 1960 as indicated by his memorandum of September 27, 1960,

to Cades, Cullinan and Solari. Appellant acknowledges that during the month of September 1960, Rosenthal *again* had the papers for the lesser title presented to Brangier who would not sign them. (Brief p. 33.)

Before Brangier finally sold the property to Clouzot he knew of the government's consent to a transfer of the land to Rosenthal, and Cades wrote to Cullinan that Brangier

> "will advise me as to the receipt of the balance of the purchase price. I will advise you as soon as I hear from Mr. Brangier further in the matter." (Exhibit P-27; R. 137; R. 294.)

Appellant relies on *Restatement of Contracts* § 458, comment b, to support his mistaken assertion that he was excused from performance. (Brief, p. 34.) The cited section is not applicable. If there was any impossibility, which we deny, it was only a temporary impossibility. The applicable section is 462, quoted on page 14 of our Brief. Appellant relies on 6 *Williston on Contracts* (rev. ed.) § 1938 for his allegation that "the impossibility was of uncertain duration, and performance was excused." The cited section does not support Appellant's position. It says:

> "Impossibility due to foreign law does not fall within the same class as that due to domestic law, and it has generally been held no excuse for breach of contract."

Moreover, this section and the section from the Restatement deal with "impossibility due to change of

law." Does Appellant now claim that there was a change of law?

Restatement of Contracts, § 276, which deals with rules for determining materiality of delay in performance, reads as follows:

> "(d) In contracts for the sale or purchase of land delay of one party must be greater in order to discharge the duty of the other party than in mercantile contracts.
>
> "(e) In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless, (i) the contract expressly states that performance at within a given time is essential, or (ii) the nature of the contract, in view of the accompanying circumstances, is such that enforcement will work injustice."

ANSWER TO APPELLANT'S POINT III

AMPLE EVIDENCE AND REASONABLE INFERENCES FULLY SUPPORT THE DISTRICT COURT'S FINDINGS CONCERNING ESCROW PROVISIONS.

Here, much complaint or criticism is thrown at the District Court's analysis of the negotiations and discussions of the parties concerning "escrow". The Appellant seems to make much of a suggestion that the District Court uses the words "normal type escrow" as some kind of term of art which must be defined or

interpreted and claims there is no evidence pertaining thereto. Actually, of course, examination of the Decision discloses that this term was only one small part or portion of the fairly extensive analysis and discussion of the Court concerning the ideas and intentions of the parties as to escrow. It is deemed appropriate to set forth here some of the decision language which by itself constitutes an adequate explanation of the Court's analysis (R. 38):

> "Brangier in his letter (Ex. P-3) estimates as much as 31 days, or a month, before the documents can get back to Honolulu for delivery to the bank and suggests Rosenthal send the $25,000 balance after the first $10,000 down payment, to the Bishop Bank in about 3 weeks' time. Here the very information and suggestion noted indicate *not* an intent to have the money placed on deposit in escrow immediately with Bishop Bank as a condition to proceeding further with the prosecution of the transaction, *but rather,* a purpose to carry out a *normal type* of escrow arrangement whereby, in order to insure that at the moment delivery is made and the money paid, *the title will be good,* the delivery should be made through a common escrow agent, *at the time of consummation of the transaction.* This is the intent the court finds from this letter, rather than the implication sought to be read into it and other correspondence (except as hereinafter noted) by the defendant, that, regardless of how long Brangier should take in completing his guarantee to produce clear title, Rosenthal should have the money sitting idly in escrow with the bank within 3 weeks."

and (R. 40):

> "Up to this point, then, we have what appears to be written memoranda signed by the defendant of a binding oral contract to deliver clear title to Rosenthal including government consent, for a total of $35,000 cash, $10,000 down, and the balance payable through a simultaneous transaction through escrow, whereby the $25,000 balance will be exchanged for delivery of the deeds with evidence of clear title, whenever the papers are presented.
>
> "The foregoing letters evidence a rather intimate friendship between the two men, just the opposite of the type of relationship under which Brangier would be expected to demand that his friend put up the $25,000 balance in escrow immediately and maintain it thereafter, regardless of how long Brangier should take to deliver clear title."

and (R. 41):

> "This indicates that Brangier himself knows that Rosenthal is a man of 'considerable means', a friend, and a 'very fine person', and hence there would not be any fear by Brangier that he wouldn't get his money. All of this reinforces the court's interpretation that the escrow transaction was not intended as a condition precedent, but simply as a convenient means of consummating the deal in a normal and usual business manner. The court so interprets the next paragraph of Exhibit P-5 concerning the down payment and the balance to be deposited in escrow."

Again in his decision (R. 43) the District Judge in his analysis points out that the letter in which the

"3 weeks' time" is mentioned, Exhibit P-6 was not in any sense the only language used by the parties. The Court says:

> ". . . Accordingly this letter of April 24, 1958, (Ex. P-6) did not really express, and was not intended (as between the parties) to constitute, the actual agreement, and P-6 must be construed in connection with and controlled by Exhibits P-1, P-2, P-3, P-4 and P-5, and Exhibit D-1."

And in continuing his analysis of the intentions of the parties regarding escrow, the District Judge refers to another of Brangier's letters, Exhibit P-8, and says (R. 43):

> "These are clearly facetious statements on the part of Brangier but show that he was going along with the fictitious documents to lend more credence to any attempt to reduce the fees payable to the Tahitian government. However, it further confirms the court's interpretation of the previous and real arrangement—that the balance was to be paid to Bishop Bank in escrow at or about the time of the expected consummation of the transaction, which then was estimated by Brangier to take only a very few weeks."

And again the District Judge states (R. 45), referring to the language in Exhibit D-2:

> "These provisions are entirely consistent with the court's interpretation of the previous documents heretofore stated—that the escrow was intended as the ordinary escrow arrangement and not as a requirement that $25,000 should be immediately deposited to lie idle, regardless of the

> length of the time it took to complete the transaction."

After further careful analysis of the oral testimony, the District Court says (R. 50):

> "The totality of this testimony corroborates Rosenthal's testimony and the court's finding that the deposit in escrow of the $25,000 was never considered a condition precedent by Brangier until at least January 29, 1960, when Brangier wrote Exhibits P-18 and P-19."

Surely the Court was abundantly entitled to infer that the "3 weeks' time" referred to by Brangier was a suggestion or estimate, and that the "31 days" or "one month" referred to in the Decision (R. 38) was likewise a suggestion or estimate, and it would now be an absurdity to hold that this was some kind of notification of deadline. The absurdity is demonstrated conclusively by the fact that the parties continued their discussions and negotiations for almost exactly two and one-half years more, before Brangier made his effort to repudiate and dishonor his undertaking. Brangier unhesitatingly testified that right up to and including September of 1960 his agent and attorney, Lejeune, acting for him and on his behalf, was continuing with his efforts to obtain the consent of the Governor of Tahiti. (R. 127 and 165.) Finally, Brangier's sole basis of his attempted repudiation, as disclosed by his letter of October 4, 1960, Exhibit P-25, was the then continuing refusal of the Governor to consent, and no mention was made of the non-de-

posit of the balance, and even at that time no demand was made that it be deposited.

In the light of the patently reasonable conclusions and inferences of the District Judge concerning the escrow matter, it is deemed needless to comment on the citations offered by Appellant indicating that there may be some cases dealing with escrows where the parties may have contemplated a deposit of money in advance.

As to the escrow aspects of the lease-mortgage negotiations, there is ample testimony which the Court was entitled to believe, to the effect that Appellee (Rosenthal) was ready and willing to deposit the balance of $25,000, even with Cades, Appellant's attorney, and offered to do so, and intended and desired to do so. (R. 282-283.) The District Judge was likewise abundantly entitled (R. 68 to 69) to the very reasonable inference that Rosenthal's letter of February 10, 1960, Exhibit D-23, both by its own language and when considered in the light of all of the surrounding facts and circumstances and other correspondence, constituted an acceptance of the lease-mortgage suggestion and a request to Attorney Milton Cades to proceed with at least the preliminary drafting of escrow provisions. After careful analysis, the District Judge makes this comment (R. 71):

> "Inasmuch as Exhibit D-23 indicates that Rosenthal intended to be in Honolulu March 1st, and then to go to San Francisco and return to Honolulu shortly thereafter, and Exhibit D-26 indicates that Brangier saw Rosenthal in Honolulu

> before March 7th on his way to San Francisco, it is a fair inference, from this and later correspondence, that Milton Cades, although authorized to proceed with preparation of an escrow agreement satisfactory to Brangier, did not do so, and that this was with the express or implied consent of Brangier. In this connection the court again refers to the testimony of Rosenthal, which the court finds credible, that he many times, at least orally, and at least once by letter, offered to put the money up in escrow, but was told that it was not necessary, at least at that stage. It is also a fair inference that Cades advised Rosenthal and Brangier, and Brangier acquiesced in it, that he could not draw a proper escrow agreement until the final terms of the agreement in Tahiti had been drafted in Tahiti. (See Ex. P-22)."

The matter which Appellant describes as a "lying-idle" concept is not considered by Appellee to call for any answer. It is plainly irrelevant to the present discussion, as it has already been demonstrated that there is abundant evidence, and reasonable inferences from abundant evidence, to support the District Court's findings concerning escrow.

ANSWER TO APPELLANT'S POINT IV

FINDINGS OF THE COURT CONCERNING EXHIBIT D-23 ARE REASONABLE.

This part of Appellant's argument has been referred to and answered in the foregoing, but some brief reiteration may be appropriate. Appellant appears to take a few words or expressions out of the

context of Exhibit D-23 as a whole, and sets forth a claim that the same could have no meaning other than a refusal by Appellee Rosenthal of the offered lease-mortgage arrangement. A reading of the pertinent portions of Exhibit D-23, as set out below, instantly refutes such contention, at least to the extent of showing conclusively that the inference of the District Court was reasonable:

> "Now, to the property; as you know I have seen the Governor and hoping to get his immediate approval; this will simplify the transfer. I should know any day. If he says no, we can use the other method; I have discuss this with both Jean Solari and Marcel Lejeune. The escrow methods as outlined by Brangiers seem somewhat cumbersome, nevertheless, I can send you a check at any time for the required amount to hold in escrow. If possible, I should like to predate the check and ask if you hold it and advise when to cash. This should coincide with the final signatures. My reasons for this are obvious; under any circumstance there will be no problems about this, as far as I am concerned. If I should receive the Governor's O.K., will let you know immediately.
>
> "I will like to also ensure in the event of lease-sell agreement, Brangier alters his will and makes me beneficiary of that property. What do you think?
>
> "Also, in matter of lease-sell, is there some method to insure against resale by Brangier? This is not to doubt Brangier in any way, but merely to make these documents technically perfect. Any suggestions?

"I am extremely pleased that George has decided to honor his agreement with me and in view of this, would you pass on to him the following proposal, . . ."

Surely the District Judge could not possibly be "clearly erroneous" in regarding the foregoing language as an indication of acceptance of the lease-mortgage arrangement by Appellee Rosenthal, but if there were ever any conceivable doubt about the question, the same was resolved completely by Appellant Brangier in his own testimony (R. 119):

"A. Yes. At a later date I suggested a lease with a promise to sell.

Q. You were familiar with such procedures, then?

A. Yes.

Q. You had engaged in such procedures before?

A. Yes.

Q. Is it not correct to say that such procedure was fairly common in Tahiti for the sale of property?

A. It is.

Q. And you wrote to Mr. Rosenthal about it?

A. Yes, I believe I did.

Q. And you reached agreement with Mr. Rosenthal that you would follow up on that method?

A. Yes."

and (R. 124):

"Q. When you went there in May or June of 1960, this lease mortgage arrangement was pending, was it not?

A. It was pending, yes."

and (R. 132):

"Q. Mr. Brangier, you earlier testified that an agreement was made to enter into the lease mortgage arrangement, the lease with promise of sale arrangement, and that this was made in January or February of 1960; am I correct?

A. Yes, I believe that is right."

ANSWER TO APPELLANT'S POINT V

THE DISTRICT COURT'S ALLEGED CONFUSION BETWEEN THE "ESCROW INSTRUCTIONS" AND THE "U. S. SUPPLEMENTAL AGREEMENT" IS OF NO SIGNIFICANCE.

The Appellant seeks to find that the Court misunderstood the negotiations of the parties concerning a supplemental agreement in the United States, and somehow committed error by regarding this as the same thing as the proposed or requested escrow instructions. To begin with, it wouldn't matter at all if the District Judge had not clearly understood the comments about the references to the U. S. Supplemental Agreement, as we have already demonstrated that the parties did agree to the lease-mortgage arrangement and were actively discussing either in person or through authorized representatives, the way or manner of consummating such agreement, when the attempted repudiation was made. In speaking of the draftsmanship duty assigned to Attorney Milton Cades, the Court says (R. 71):

". . . It is also a fair inference that Cades advised Rosenthal and Brangier, and Brangier acquiesced in it, that he could not draw a proper

escrow agreement until the final terms of the agreement in Tahiti had been drafted in Tahiti. (See Ex. P-22)."

And the Court very reasonably finds a relationship between the escrow instruction matter and the U. S. Supplemental Agreement matter in the language of Appellant's own attorney, Mr. Cades, in the following part of the Decision (R. 72):

> "Mr. Cades replied to this letter (Ex. D-29) by a letter of May 18th (Ex. P-22) in which he reminds Rosenthal that:
>
> " '. . . I advised you that the transfer documents or other agreement would have to be prepared under the laws of Tahiti, but that there was nothing to prevent you from having a supplemental agreement in the United States. I have discussed the matter further with George and neither one of us are sure that we understand what you mean by a property exchange. In any event, until you have agreed on the form that the transaction is to take in Tahiti, there would be no point in working up any kind of contract here . . . It is my suggestion that you wait until you have an acceptable agreement in Tahiti before you attempt to draw any supplemental agreements here.'
>
> "This is conclusive evidence, along with other evidence, that the drafting by Mr. Cades of the escrow instrument demanded by Brangier was delayed at Brangier's own instance rather than through Rosenthal's actions or inaction."

Note also the further commentary of the District Judge at page 75 of the Record.

Even if the "escrow" intentions of Appellant Brangier were definable as meaning nothing more than a deposit of $25,000 by Rosenthal, there still remains the conclusive and unanswerable fact that Brangier was obliged by the only applicable rule of law to give notice and make demand first, before he could declare a rescission. This matter is discussed elsewhere in this Brief.

ANSWER TO APPELLANT'S POINT VI

DEFENDANT WAS NOT DENIED SUBSTANTIAL JUSTICE WHEN HE ATTEMPTED TO IMPEACH PLAINTIFF.

The allegation of error in this matter is frivolous. No authority is cited in support of Appellant's position. Obviously, there was no error. The matter is adequately discussed in the Trial Court's Decision. (R. 53-54.)

The manner and scope of cross-examination is generally considered as largely within the discretion of the trial court. 5 Am. Jur. 2d, *Appeal and Error,* §884. The exercise of such discretion cannot be made the subject of review on appeal. *Johnston v. Jones,* 1 Black (66 U.S.) 209, 17 Law. Ed. 117 (1862). In *Territory v. Goo Wan Hoy,* 24 Haw. 721 (1919) the court held (p. 727):

> ". . . the extent to which disparaging questions not relevant to the issue may be put on cross-examination is discretionary with the trial court and its rulings are not subject to review here unless it appears that the discretion was abused. *Republic v. Luning,* 11 Haw. 390."

ANSWER TO APPELLANT'S POINT VII

THE AWARD OF DAMAGES WAS PROPER AND NOT EXCESSIVE.

Appellant begins his argument on Point VII with the incorrect statement that (Brief, p. 52):

> "The court's award of $40,000 in damages was founded upon its determination that the property had a fair market value of $75,000 as a hotel site or multiple-unit subdivision."

It is true that the court found that the property had a market value of $75,000 (R. 89) and that the court took into account its possible use as a hotel site or multiple unit subdivision although Rosenthal intended to use it initially for a residence. It was proper to do so.

Appellant relies on the old English case of *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502 (1854), cited in 15 Am. Jur., *Damages,* §52. In that case the plaintiffs had taken a broken shaft of a mill to the defendants, who were carriers, for the purpose of having it carried to another city so that a new shaft could be made. The defendants knew that the plaintiffs were millers of the mill. The delivery of the shaft by the carrier was delayed by some neglect. As a result, the plaintiffs did not receive the new shaft for several days after they should have received it, the working of the mill was thereby delayed, and the plaintiffs thereby lost certain profits that they would otherwise have received. The court held that the information communicated by the plaintiffs to the defendants was not sufficient to show that the profits of the mill would

e stopped by an unreasonable delay in the delivery f the broken shaft to the third person and that the laintiffs were, therefore, not entitled to recover such rofit.

We submit that neither *Hadley v. Baxendale* nor 5 Am. Jur., *Damages,* §52 has anything to do with ur case. In our case we are concerned with damages or the breach of a contract for the sale of land. That ubject is discussed in 55 Am. Jur., *Vendor and Purhaser,* §555, as follows:

> "The general rule is laid down in many cases that the purchaser is entitled, as general damages for the wrongful failure or refusal of the vendor to convey, to recover the difference between the actual value of the land and the agreed price, together with any payments he may have made, or the value of the land deducting the amount of the purchase money unpaid. These statements are substantially the same in effect and result in giving the purchaser as damages the benefit of his bargain in case the land is worth more than the price agreed upon. (Citations.) This is very generally recognized where the vendor cannot be said to have acted in good faith (Citations), as where, after the making of the contract, he disables himself by his own act or neglect from being able to convey (citations), or where, having the ability to do so, he refuses to convey because of an advance in the value of the land or otherwise. (Citations.) . . ."

The actual value referred to in the preceding quotation is, of course, market value, "the highest price obtainable in the open market for cash." 55 Am. Jur., *Vendor and Purchaser,* §556. See Annotation, 48

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> "The general rule is laid down in many cases that the purchaser is entitled, as general damages for the wrongful failure or refusal of the vendor to convey, to recover the difference between the actual value of the land and the agreed price, together with any payments he may have made, or the value of the land deducting the amount of the purchase money unpaid. These statements are substantially the same in effect and result in giving the purchaser as damages the benefit of his bargain in case the land is worth more than the price agreed upon. (Citations.) This is very generally recognized where the vendor cannot be said to have acted in good faith (Citations), as where, after the making of the contract, he disables himself by his own act or neglect from being able to convey (citations), or where, having the ability to do so, he refuses to convey because of an advance in the value of the land or otherwise. (Citations.) . . ."

The actual value referred to in the preceding quotation is, of course, market value, "the highest price obtainable in the open market for cash." 55 Am. Jur., *Vendor and Purchaser,* §556. See Annotation, 48

ALR 71. In determining such value it is proper to consider the highest and best use of the land. *Dady v. Condit,* 209 Ill. 488, 70 N.E. 1088 (1904).

The same rules of law are discussed in Corpus Juris Secundum in the following manner:

> ". . . in all jurisdictions where the vendor refuses to convey when he has title (citations) or wilfully puts it out of his power to convey (citations), the purchaser may recover for loss of his bargain." 92 C.J.S., *Vendor and Purchaser,* §592 a.
>
> "Taking the value of the property at the time of the breach or for performance as a basis, the measure of damages ordinarily is the difference between such value and the contract price (citations), with, according to some cases, interest on such difference (citations), to the date of judgment. (Citations.) . . . and it has been held or recognized that in addition to the above items of recovery the purchaser is entitled to the return of the purchase money, if any, which has been paid (citations), with interest (citations), from the time of payment (citations); . . ." 92 C.J.S., *Vendor and Purchaser,* §595.
>
> "In accordance with general rules of damages, the market value (citations), or, as sometimes stated, the fair market value (citations), of the land sold is taken as the basic figure in determining the amount of damages; . . . While, in determining the value, there is no limitation to a particular use to which the land may be put (citation), if, by reason of the adaptability of land to a particular purpose, it commands a higher price in the open market than it otherwise would, such greater value is to be considered.

(Citation.)" 92 C.J.S., *Vendor and Purchaser,* §599.

There is substantial evidence in the record supporting the finding of the Court that the reasonable value of the land was at least $75,000.00 (R. 88-90, 293, 300-301; 305-307; 314-315; 367.) The only appraiser who testified was Andre Leontieff, a resident of Tahiti for over 28 years, the only real estate agent there for 20 years (R. 284), who under a government appointment in Tahiti had occasion to appraise real property. He was "called up many times to expertize or estimate property in litigation." (R. 285-286.)

We do not understand Appellant's argument relating to interest. It seems to be predicated on the fact that Rosenthal refused the return of the $10,000.00 in October 1960. Rosenthal had to refuse it at that time. He was still attempting to compel Brangier to live up to the contract. Rosenthal was deprived of the use of the $10,000.00 from the time of its deposit in April 1958 until the withdrawal by stipulation in 1961. As a matter of fact, Rosenthal should also be awarded interest on the $40,000.00 from April 1961 when Brangier conveyed the property to a third person, or from September 1961 when the Complaint was filed in this action, until March 26, 1963, the date of the judgment.

CONCLUSION

Point by point, the contentions put forth by Appellant are fully and effectively refuted in and by the record in the case. The testimony, the exhibits, and

the abundant reasonable and proper inferences from the evidence all point to the existence of a valid contract between the parties which was wrongfully broken by Appellant, to the proven reasonable damage to Appellee in the sum of $40,000.00 plus interest. The painstakingly careful and well-reasoned decision of the District Court not merely passes the test of being other than "clearly erroneous", but is amply supported in all respects by substantial evidence of a kind describable as clear and convincing. The judgment must therefore be affirmed.

Dated, Honolulu, Hawaii,
February 7, 1964.

Respectfully submitted,
THOMAS W. FLYNN,
BERNARD H. LEVINSON,
Attorneys for Appellee.

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

THOMAS W. FLYNN,
BERNARD H. LEVINSON.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE BRANGIER,	)	
Defendant-appellant,	)	
vs.	)	No. 18789
JOHN B. ROSENTHAL,	)	
Plaintiff-appellee.	)	
	)	

REPLY BRIEF for APPELLANT

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Of Counsel:

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Plaintiff-Appellee.	)	
	)	

REPLY BRIEF FOR APPELLANT

STATEMENT OF FACTS

Appellee's references "supporting each statement of fact" (Rule 18(2)(c) wholly fail to point to evidence from which this court can determine (a) the terms of the fee simple contract forming the basis of the suit; (b) the terms of the alternative lease-mortgage "agreement" on which damages have been awarded; or (c) the basis for the excessive damages awarded (which actually exceed the price paid for an unconditional approved transfer of the fee simple title to the land). (R-161). The record references for many of the most important of Appellant's "facts" are solely to the opinion of the trial court,[1] which is disputed on this appeal, both as to findings of fact and conclusions of

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(1) Examples: The fact that Brangier did not have a right to impose payment in advance as a condition (Appellee Br.p.16), or the "fact" that Rosenthal had a right to insist on a side agreement. (Appellee Br.p.17). Likewise, Appellee's Br.pp. 18, 21, 22, 23, 24 and 25.

aw. Space restrictions in this reply brief will not permit omment upon each point of disagreement, but many of the essential acts in dispute will be discussed hereafter.

A brief chronology will aid the court and also demonstrate how clearly Appellee has failed to meet the necessary urden of proof:

April 16, 1958 -- Written offer relating to fee simple sale of land requiring governmental consent for $35,000 with $10,000 down with balance in about three weeks (Exh. P-3);

April 17, 1958 -- Instructions to Rosenthal to send $25,000 to bank in Honolulu (Exh. P-5);

April 24, 1958 -- Conditional acceptance of offer (Exh. P-6, R-91);

April 25, 1958 -- Rosenthal writes if "for any reason, the sale as contemplated is not effected, $10,000 is to be returned" (Exh. P-2);

April 28, 1958 -- Brangier asked Rosenthal to "send balance in near future" (Exh. P-8);

May or June, 1958 -- Application made for government consent which is refused (R-116-118);

October 30, 1958 -- Rosenthal writes that after discussion in Tahiti he will try to have "ready to go" procedure. (Exh. D-20);

Brangier's arrangement with Rosenthal is that money is to be paid in Honolulu (R-125);

June to Fall, 1959 -- Rosenthal goes to Tahiti to obtain government consent. (R-172, 173, 217, 218).

" Rosenthal's application for fee simple consent is denied. (R.213-215).

January 29, 1960 -- Brangier offers to modify agreement to a mortgage-lease if Rosenthal pays in advance and deposits the money in Honolulu. (Exh.P-19).

February to September, 1960 -- Rosenthal is not satisfied as to tax and other legal consequences concerning the lease-mortgage (Exh. D-27); and "negotiations" continue on details of this alternative contract (Exh. D-22, D-34) but always on condition that there be an advance deposit of the full price. (Exhs:P-18, P-19, D-24, D-25, D-26, R-158-160).

" Rosenthal insists on a side United States agreement (Exhs: D-27, D-33, D-36);

" Says he can deposit $25,000 but wants to "predate the check". (Exh. D-23).

February 11, 1960 -- Brangier advises Rosenthal's attorney the first step is to deposit $25,000.

September 25, 1960 -- Negotiations are still not concluded and situation seemed hopeless (R-357).

October 4, 1960 -- Brangier cancels the original agreement and returns the $10,000. (Exh. P-25).

October 24, 1960 -- Rosenthal again makes application for government consent (R-216).

October 25, 1960 -- Rosenthal advises Brangier he will make payment only when escrow arrangements (meaning the side United States agreement and all details concerning the lease-mortgage are completed). (Exh. D-38).

January 9, 1961 -- Admission by Appellee's California attorney that he had "apparently overlooked" sending either the deposit of $25,000 or the escrow instructions to Appellant's Honolulu attorney. [Appellee admitted that he never deposited the $25,000 with his California attorney (R-258)].

March 8, 1961 -- Conditional consent of the governor to application of Rosenthal.

June, 1961 -- Property sold by Brangier in unconditional fee simple to third parties for $45,000.

March 23, 1963 -- Trial court awards "loss of bargain" damages (under "either California or Hawaiian law") based solely upon evidence of the value of the fee simple title.

REPLY TO APPELLEE'S ARGUMENT

. NOTICE OF INTENT TO TERMINATE AND DEMAND FOR PERFORMANCE WAS GIVEN BY BRANGIER.

Appellee argues that Brangier did not terminate the riginal contract because he gave no notice thereof, and made no emand for performance by Rosenthal.

But the substance, not the form of a notice of intention

o terminate is the essence of the legal requirement of notice nd demand. Thus the notice may be by actual declaration of escission or by acts brought to the other's knowledge amounting n law to such a declaration. [Pittsburg Plate Glass Co. v. arrett, 42 F.Supp. 723, 730, (D.C. Ga.)]. The purpose of such otice is to give the other party reasonable opportunity to erform -- to complete whatever had been performed.(2) Rosenthal reated Appellant's letter as both a notice and a demand for erformance, because just two weeks later he on his own behalf pplied for the Governor's consent to a fee simple transfer R.216), and at the same time wrote to Brangier demanding a ease-mortgage, saying that he was instructing Cades to prepare n escrow agreement "as previously desired by you", and also say- ng that Cades would get the $25,000 "to be paid to you as soon s the escrow" was completed. (Exhibit D-38).

Thus, Rosenthal took and treated Brangier's letter of ctober 4, 1960 (Exhibit P-25) as a notice of intent and as a emand for performance. But Rosenthal still never performed: he governor's conditional consent (which would have required a llateral modification of the contract to be acceptable) was ot given until over five months after Brangier's notification etter and almost three years after the original contract. ades did not get a copy of Exhibit D-38 until over two months ater, and Rosenthal never placed the $25,000 with Cades in

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2) The record is replete with evidence that Rosenthal would not deposit $25,000 except on his own terms and conditions; that at no time was Brangier in a position to enforce the original or the alternative contract against Rosenthal and thus, mutuality was completely lacking. See Exh. P-30 (Depos. of Rosenthal).

escrow as was expressly required under the alternate lease-mortgage proposal. [See Op. Br. p.13, fn.8.] Appellant therefore submits that the required notice of rescission was given, and, as is set forth in Op. Br. Point I, that Brangier had the right to withdraw his offer of lease-mortgage and to cancel the original agreement, which was done by his letter of October 4, 1960.(3)

I. PERFORMANCE BY BRANGIER WAS EXCUSED BECAUSE OF IMPOSSIBILITY.

(a) The Original Contract: Before the original offer to transfer the fee simple title to this property was made Appellant had an opinion from his Tahiti attorney that there would be no difficulty in obtaining the required government's consent because both parties to the transfer were non-resident Americans (Exhibit P-5). Appellant passed on this information to Appellee by his letter of April 2, 1958 in which he said "You asked me to advise you as soon as I heard from Tahiti. There will be no problem in having the title to my property transferred to your name". (Exhibit P-1). So, it is clear that from the beginning, as found by the Court (R-35), both parties considered the consent of the governor to be a foregone conclusion and that there

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(3) Appellant's position that "negotiations" could not be broken off (Appellee's Br.p.4) is a judicial admission that an enforceable contract was not at any time in effect after the French Government had refused fee simple transfer to Appellee, and mutuality was completely lacking from and after said refusal. See Appendix A for further judicial admissions in Appellee's opening statement which again clearly demonstrates that the "negotiations" concerning the lease-mortgage never were finalized into an enforceable agreement.

ould be "no trouble" on that score. (R-363).

Appellee, on page 12 of his brief, argues in support f the erroneous finding of the trial court that as a result of he above facts Brangier "warranted" the approval of the governor nd that the failure to obtain the required consent within a easonable time did not constitute an excuse for appellant's on-performance on the grounds of supervening impossibility. R-79). Appellee argues that the possibility of a failure to btain the consent was foreseeable, and that Appellant, in order o protect himself, should have expressly provided in the con- ract against such a contingency. The question as to whether ppellant "warranted" the approval of the governor (i.e. undertook o pay the loss of bargain damages if such approval was not forth- oming,) is a question of law since the facts on this point are ot disputed.(4) The trial court's holding was and is reversible rror as is shown by the following authorities:

In the case of L. N. Jackson & Co. v. Royal Norwegian overnment, 177 F2d 694 (2d Cir. 1949) plaintiff had contracted ith the defendant shipowner to transport a cargo of copra. The ontract was made just prior to the entry of the United States nto World War II. The defendant had previously agreed with the nited States Maritime Commission to operate the ship pursuant

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4) Rosenthal testified (Ex.P-30, p.19) "I think it was anticipated that there would be a problem in obtaining authorization of the transfer by the French Government. They had a long-standing policy not to allow foreigners to acquire land." Appellee's reliance on Exh.P-1 as entitling him to damages for loss of the bargain because of the government's refusal of consent is not supported by the applicable law, as is more fully discussed hereinafter.

to a system of ship warrants which gave the Maritime Commission the right to control the movement of the ship and also the cargoes which it might carry. Pursuant to the directions of the Maritime Commission defendant was caused to breach its contract with plaintiff and in the resulting litigation pleaded "supervening impossibility" as a defense. Plaintiff was successful in arguing that defendant should have in the contract expressly protected itself against governmental intervention. However, the appellate court reversed on the ground that this requirement put too great a burden upon the promissor, and cited many authorities showing that to follow the trial court's view to its logical limit would be to destroy the doctrine of supervening impossibility. The court further said:

> "Whether or not these authorities go so far as to state a definitive rule of preferred interpretation, they do certainly suggest that, <u>where the external circumstances present a case for the fair operation of a rule excusing performance, that shall not be denied unless the fault in not providing against it seems clear and unilateral</u>. We think the court below placed too heavy a burden upon the defendant and that fairness and justice require the acceptance of the excuse as being both compelling and beyond the terms of the defendant's obligation, properly considered." [177 F2d.p.699] (emphasis added).

The court observed that both plaintiff and defendant were aware of the possible failure of the government to allow plaintiff's cargo to be transported and that, as a result

" ... <u>there was no arbitrary obligation on the defendant to protect itself by express stipulation against the operation of the system</u>". (p.700). Thus, the court expressed the general

rinciple that where both parties are aware of the required ful-
illment of a condition precedent in order that their contract
e carried out, such a condition is an implied part of the con-
ract and need not be written into it. This principle was recog-
ized by Justice Holmes in the leading case of the Kronprinzessin
ecile, 244 U.S. 12, 24, 37 S.Ct. 490, 492, 61 L.Ed. 960, where
e made his famous statement that the contract "... embodied
imply an ordinary bailment to a common carrier, subject to the
mplied exceptions which it would be extravagant to say were
xcluded because they were not written in. Business contracts
ust be construed with business sense, as they naturally would
e understood by intelligent men of affairs." (Emphasis added).

Appellant submits that under the facts in this case,
here both parties were admittedly aware of the requirement of
he consent of the French government to the fulfillment of their
ontract, that such a consent was an implied condition precedent
o Appellant's duty to perform and that "it would be extravagant
o say it was excluded from the contract because not written".(5)

Both Appellant and Appellee did everything within reason
o secure the governor's consent, which was a condition prece-
ent to the operation of their agreement. For over two years
his consent was repeatedly refused. Thus after the passage of
uch more than a reasonable time and on advice of counsel (Exh.
24 & 25), the Appellant terminated the original contract on

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5) It is noteworthy that Appellee refers to no authorities, Hawaiian, Californian, or general to the contrary.

he ground of intervening impossibility. Under these circumstances ppellant, in good faith, had legal cause to take this action nd the trial court's denial of his right to do so constituted rror as a matter of law.

(b) The Lease-Mortgage Proposal: Appellee sued on a ontract which was impossible of performance and properly ter- inated (R-193), yet at page 16 of his brief he complains that rangier had no right to impose the condition in the modification r alternative lease-mortgage proposal of January 29, 1960 that he $25,000 be deposited in escrow. This condition was part and arcel of Brangier's offer of an alternative proposal or contract hich was prompted by the then obvious fact that the required pproval of the government had not been obtained, and in all iklihood, would not be forthcoming in the foreseeable future. rangier had every right to condition this new offer with the equirement that the $25,000 be first deposited as one of the ts required for its acceptance. Rosenthal would have this court elieve he was ready (R-182 to pay and that the money was "on hand" -182) even in the face of his persistent refusal to make any mmitment or payment without side agreements, tax understandings, ll provisions and the many other factors which were subjects "negotiations" between the parties right up to the date of ppellant's termination of his proposed offer. Brangier had ver been obligated to enter into a lease-mortgage agreement fore this time, and his offer to do so could certainly be con- tioned in any manner he might reasonably impose. Since his nd had been tied up for approximately two years it is under-

tandable that Brangier would so condition his new proposition s to insure his being promptly paid. At any rate, there is no ispute in the record about the fact that Rosenthal did not ither pay the money into escrow, as the condition in the offer equired, nor did he make a timely tender of the money [as he ffered to prove -- but completely failed to do (R-112)], and nat he therefore never made an effective acceptance of the aid offer. Appellee argues, at p.13, that Rosenthal was ttempting to put the lease-mortgage arrangement into effect rior to the time Brangier cancelled. How was Rosenthal "trying o put into effect"? By trying to get Brangier to sign a lease-ortgage without payment of the $25,000 balance? The payment f the said balance into escrow was an express condition prece-ent to Brangier's duty to sign a lease-mortgage. (Exhibits -18 & 19). Did Rosenthal encourage any agreement by consis-ently refusing to give Cades the required escrow instructions, r by inserting the requirement (in fact a counter-offer) that here must be a U.S. supplemental agreement concerning the exchange" of the property? (Exhibit D-29). The terms of rangier's offer were unequivocal; the uncontradicted evidence hows that Rosenthal never complied with these terms, and there-ore, by virtue of the basic law of contracts, no contract r mutually enforceable understanding ever resulted between the arties with respect to the lease-mortgage proposal.

II. THE ESCROW PROVISIONS.

As authority for his position, Appellee cites at great ength the very findings of the lower court which are disputed

by the Op. Br., pp 35-41 and also quotes as authority some of the lower court's erroneous findings concerning the proposed "escrow" and "U.S. Supplement" arguments.

The Appellee's brief fails to refer to proof of any kind on which the trial court could have based his finding that something called a "normal type" escrow was intended; the record indicates the opposite. The complexity of the lease-mortgage device made it impossible for anyone to draw any agreement in the absence of a meeting of the minds as to how the parties would proceed. In the face of Rosenthal's doubts and misgivings which resulted in "negotiations" continuing right up to October 4, 1960 (Appellee's Br.p.4), it is obvious that the trial court has overlooked the fact that there was no "arrangement", "agreement" or "understanding" that Brangier could have enforced against Rosenthal at any time.

With this obvious lack of mutuality, it is clear that the lower court found that the parties "intended" something entirely opposite to what their own actions and correspondence showed.

V. EXHIBIT D-23. FINDINGS BY THE TRIAL COURT ARE CLEARLY ERRONEOUS.

Appellant will stand on the wording of Exhibit D-23 itself to support his position that the exhibit was not an acceptance of the lease-mortgage proposal, as the lower court erroneously found. True, as far as Brangier was concerned he believed that he was obligated, that there was an agreement (R-132). But nowhere in the record is there support for the finding and conclusion that Rosenthal ever accepted Brangier's lease-mortgage offer. Indeed, the record shows just the contrary, as discussed

bove and in Op.Br. pp 41-44. Thus, Brangier's mistaken opinion s to the legal effect of the facts must give way to the evidence hich shows a complete lack of mutuality -- that Brangier's offer f a lease-mortgage, to be accepted by the deposit of $25,000, as never accepted, and that a contract did not result.

. THE CONFUSION BETWEEN "ESCROW" AND "U.S. SUPPLEMENT".

Appellee argues that any confusion by the court was of o significance, because "the parties did agree to the lease-ortgage arrangement, and were actively discussing either in per-on or through authorized representatives, the way or manner of onsummating such agreement ...". (Appellee's brief p.29). ppellant submits that this is mere playing with words: If he "arrangement" had been agreed upon, why the need to discuss ne "manner of consummating such agreement"? Appellee's own etailed memorandum of matters requiring resolution (Exh.D-27) efore the alternative lease-mortgage agreement could be con-(6)
ummated removes all doubt on this point.

[. THE REFUSAL TO ALLOW IMPEACHMENT OF PLAINTIFF.

Appellant cites Rule 61, Federal Rules of Civil Pro-

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6) Furthermore, on January 29, 1960, Appellant wrote Rosenthal -- "If you are not in a position to write a check for $25,000 have the money transferred to Cades in some manner" (P-18); he also wrote to his Tahiti attorney, "before you go ahead with the papers Rosenthal must deposit the balance due me in escrow ..." (P-19). The entire record shows the Appellant's willingness for over two years to sign documents once the deposit of $25,000 was made.

edure, in support of his position. Appellant has shown in his pening brief specifically how, why, and in what way he was lenied substantial justice by being refused the right to corss-xamine Rosenthal as to why he had failed to list either the ahiti land or the Tahiti contract in his sworn schedule of ssets filed in his California divorce proceeding. The cases ited by Appellee have no application because they pre-date the doption of the Federal Rules of Civil Procedure.

II. THE AWARD OF DAMAGES WAS IMPROPER AND EXCESSIVE.

At pages 32-35 of Appellee's brief, he falls into the ame error, in discussing the proper award of damages in this ase, as did the trial court.

There can be no argument but that the trial court ecognized the existence of two separate agreements between the arties concerning the transfer of the land (R-194). The orig-nal agreement contemplated a fee simple transfer of the title rom Brangier to Rosenthal approved by the French government. his consent was not forthcoming for over two years after the riginal agreement was made, despite the best efforts of both f the parties. The second "agreement" as found by the court, ame into being simply because of the frustration or impossibility onnected with the first agreement. This second agreement was he lease-mortgage proposal which the trial court found would onvey "... a much inferior title to that he [Brangier] had nconditionally covenanted to convey, but which Rosenthal was illing to accept in view of the Governor's refusal to approve fee simple sale (R-76).

There is no evidence in the record to even indicate, much less prove, any bad faith on Appellant's part in entering into the original agreement to convey in fee simple, or that the failure to obtain the consent of the French government was in any way due to lack of diligence or good faith on his part. The significance of this last stated fact is extremely important in this case because it is directly related to the erroneous measure of damages applied by the trial court. In the trial court's opinion (R-79) we find the following:

> "Moreover, this court holds that the parties intended the executory contract at least to be governed by the laws of California or Hawaii, rather than the laws of France or Tahiti, and under such laws, the right to damages for breach of such an executory contract, and the validity of such executory contract, would not be affected by impossibility of securing the French government's consent."

Appellant submits that even assuming arguendo that the right to damages conceivably might not be affected by the impossibility of securing the French government's consent, certainly this fact would affect the measure of damages to be applied to the case. The damages awarded Appellee by the trial court were measured by Appellee's alleged "loss of bargain" (see Appellee's Br.p.5). Such a measure of damages is applicable under the majority rule (no cases have been found on this point in Hawaii) and the California law only in situations where the proof shows that the vendor failed to convey property as a result of his bad faith. In 55 Am.Jur. 951 Vendor and Purchaser, 557. This rule is set out as follows:

> "In many jurisdictions a distinction is made as regards the general damages recoverable by the purchaser under a land contract when the vendor is unable to convey between cases where the vendor acts in good

faith in entering into the contract and those in which good faith is wanting. While it is generally recognized that the purchaser is entitled to recover the difference between the value of the land and the agreed price, to recover for the loss of his bargain, where the vendor cannot be said to have acted in good faith, it is held, in cases where the vendor does act in good faith, that the measure of damages is the amount of the purchase money paid, with interest, thereby denying to the purchaser any recovery for the loss of his bargain. This is the rule laid down in the early English case of Flureau v. Thornhill, 2 W.Bl. 1078, 96 Eng. Reprint 635, decided in 1776 and subsequently followed in that country, and adopted in a majority of jurisdictions in this country and in Canada." (emphasis added)

The majority rule has been codified in California

nd is §3306 of the California Civil Code, Annotated:

"Breach of agreement to convey real property. The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land". (Emphasis added)

Since the trial court expressly found that "... the

arties intended the executory contract at least to be governed

/ the laws of California or Hawaii ..." (R-79), Appellant

ubmits that the above quoted law governs the assessment of

amages in this case. Now, as mentioned above, there was no

roof, or any finding by the trial court, that Appellant, by

rtue of bad faith, failed to abide by his original agreement

o convey the fee simple title. All of the evidence shows that

oth Appellant and Appellee did their best to obtain the requi-

te approval of the French government, but that for over two

ears, from the date of the original agreement until Appellant's

escission, this consent was refused despite all efforts made.

This being the state of the record, it must follow that the trial court did not, and could not under applicable law, award damages for any breach of the original contract based on a measure of "loss of bargain". It follows then that the "loss of bargain" damages which were awarded had to be for the alleged breach of the second agreement which was the lease-mortgage proposal involving a title "much inferior" to the fee simple title (R-76).

Furthermore, with respect to the original agreement to transfer the fee simple title, damages measured by "loss of bargain" could not properly have been awarded because from the inception of the negotiations concerning this contract both parties knew that Appellant could not perform unless the consent of a third party (French government) was obtained. It has long been the law that when a vendee knows at the time of entering into a contract for the purchase of land that his vendor does not have present title, or that the vendor's ability to convey is dependent upon the assent or cooperation of a third party, then in the event of the vendor's default because of a good faith failure to obtain title or the required consent of the third party, the measure of damages would be the amount paid plus expenses and interest; no "loss of bargain" damage is awarded under such circumstances. See Garcia v. Yzaguirre, --Tex.---, 213 SW 236 (1919); Northridge v. Moore, 118 N.Y. 19, 23 NE 570 (1890).

Also on this point, Appellant cancelled the original fee simple agreement in reliance on the advice of legal counsel. (P-24 & P-25). The governing California law is that a vendor

so acting cannot be held in bad faith, and under CCA Sec.3306, supra, "loss of bargain" damages may not be awarded. See Fox v. Iced, 317 P2 608 (Supreme Court of Calif., 1957).

Looking again at the trial court's opinion we see that the only "bad faith" found with respect to Appellant's actions relates to the lease-mortgage proposal.

> "... Brangier was unable to deliver clear title through governmental consent, and since as Brangier himself testified, government consent was not required to the lease-mortgage type of transaction, and since further, Rosenthal was willing to accept the lease-mortgage type of transaction, there was no impossibility in fact, but only one dreamed up by Brangier for his convenience." (R-78) (7)

The court regarded this situation as showing "double dealing" by Appellant and also bad faith (R-78). However, this bad faith" has only to do with the alleged second agreement between the parties which involved the lease-mortgage proposal.

Assuming the existence of such an agreement, as did the trial court, a finding of bad faith concerning its breach would, under the applicable law, authorize the court to make

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7) This is the clearest indication that the court awarded damages on the basis of Brangier's refusal to enter into the lease-mortgage type of transaction; which Appellee urges (Br.p.12,13 and the court finds Rosenthal was willing to accept (R-67). However the court has completely overlooked the fact that at no time was there a meeting of the minds between the parties as to how this transaction could be carried out in a manner acceptable to Rosenthal, in the face of his persistent refusal to release the money until the "arrangements" had been completed. It is impossible to find damages for breach of executory contracts under Taihitian law, California law, or Hawaiian law, whichever applies under the conflict of law principle, where there is no contract to begin with. Under the conflict of law rule relating to contracts for transfer of land Tahitian law or the lex situs would be applicable (Minor, conflicts of laws §11 (1st ed. 1901) but there is a complete absence of proof in the record as to foreign law other than the statement in Exhibit P-25.

an award of damages to Appellee measured by his "loss of bargain" for breach of the lease-mortgage agreement. But this was not done in this case. The court awarded damages measured by "loss of bargain", to be sure, but the award was based on evidence which had solely to do with the value of the fee simple title of the property. There is not one single word of evidence which would go to show the value of the "much inferior title" arising under the lease-mortgage proposal which the court found that Appellant had breached in bad faith. In 55 Am.Jur. 951, Vendor and Purchaser, Sec. 556 the editors state:

> "The value of the fee simple estate in the land is not to be considered if the agreement to convey would be satisfied by the conveyance of a lesser estate". See Rohr v. Kendt, 3 Watts & S(Pa) 563, 39 Am. Dec. 53.

The trial court has expressly found that Appellee "... was willing to accept the lease-mortgage type of transaction ..." (R-78) and therefore the error in using fee simple value as a measure of damage for breach of the lease-mortgage (much inferior title) agreement is readily apparent.

It is submitted that the measure of damage in this case is governed by the majority and California law set out above. The record shows: (1) no bad faith on Appellant's part regarding the original fee simple agreement, (2) both parties knew of the requirement of the French government's consent from the beginning, (3) Appellant cancelled this agreement on advice of counsel, (4) the Appellee was willing to accept a "much inferior" title pursuant to the lease-mortgage arrangement, and (5) the trial court only found a "bad faith" breach with respect to the alleged lease-mortgage agreement. In the light of these

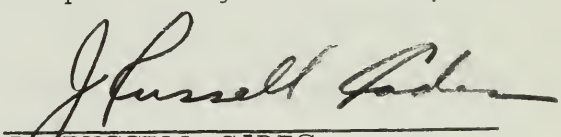
facts the "loss of bargain" measure of damages used by the court could only apply to the alleged breach of the lease-mortgage proposal. It was, therefore, prejudicial error for the trial court to base his findings solely on the value of the fee simple title in attempting to award a "loss of bargain" recovery for the breach of the lease-mortgage agreement.

There was no evidence at all regarding the value of the "much inferior" lease-mortgage title and consequently the award to Appellee finds no support in the record. The trial court's failure to apply a proper measure of damage and also the use of irrelevant evidence upon which to base the award is clear error, and highly prejudicial to Appellant. The judgment below, must therefore be reversed so as to prevent manifest injustice.

CONCLUSION

For the reasons stated above and in the opening brief for Appellant the judgment entered below must be reversed.

Respectfully submitted,



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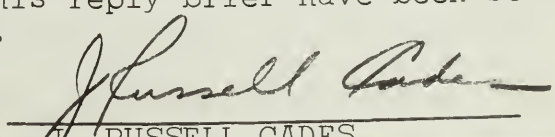
Of Counsel:

SMITH, WILD, BEEBE & CADES

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and that three copies of this reply brief have been served upon Appellee this March 30, 1964.



J. RUSSELL CADES

APPENDIX A: Appellee's Opening Statement

MR. FLYNN: I would like to make a brief opening tatement, if the Court please.

This case involves a contract for the sale and purhase of land in Tahiti, the contract having been made during he month of April, 1958.

There were many complications involved in the carrying ut or consummating of the contract, and by reason of that a umber of discussions and conversations took place between the arties themselves and between the parties through their repreentatives for a period of approximately two years.

One of the complications, if not the principal one in he consummation of the contract, was the requirement of the rench Government over its Polynesian possessions, that there be he consent of the Governor of Tahiti for certain transactions n the sale of real property.

In the course of handling the details of performance f the contract on the part of both sides, it developed that the overnor's consent was applied for, and at one time, possibly on wo occasions, whether formally or informally or both, refused. nd in the course of appealing that decision of refusal, and in he course of continuing with discussions as to methods and ways nd means of carrying out the existing contract between the arties, there came up a practice or procedure apparently well nown in Tahiti and well known to the defendant, and then became ell known to the plaintiff, a procedure that may be described s a lease and mortgage transaction, with the lease having in its [illegible] promise of sale

THE COURT: What is that, now?

MR. FLYNN: A transaction that may be described as a ease and mortgage, with the lease having in its terms a promise sale or an option in the lessee to buy, and the option in- luding the right to transfer such option to any other party, ny other person, the lease being for a term of less than ten ears, or specifically nine years and three hundred sixty days, ne reason for that being that the French law had certain pro- isions applicable to leases over ten years in duration.

It was fully agreed by the parties, both personally nd through their various agents and attorneys, that the trans- tion would be carried to a conclusion with this method, at ne same time being agreed that continued efforts would be made obtain the consent of the Governor of Tahiti.

While this portion of the entire transaction, or this rtion of the proceedings during the years in question, took ace in January and February of 1960 --

THE COURT: What is that, what took place?

MR. FLYNN: This portion of the story having to do with e lease mortgage because of the then existing refusal of the vernor of Tahiti to consent to transfer-- in the course of the xt several months --

THE COURT: Took place when?

MR. FLYNN: In January and February.

THE COURT: What year?

MR. FLYNN: Of 1960. And in the next several months e parties continued to work out the transfer by this means. included obtaining governmental, Tahitian governmental approval

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f payment, the matter of the exchange rules and laws of the overnment there, and a consent was required for putting into ahiti and entering into a transaction there involving the payent of $25,000 as the balance of the price agreed upon between he parties, the full principal sum being $35,000, of which 10,000 had been deposited by the plaintiff with the defendant n 1958, April of 1958.

While these details were being brought to a conclusion, on or about October 4 of 1960, the defendant wrote a letter to he plaintiff purporting to cancel their entire agreement.

THE COURT: What date was that?

MR. FLYNN: October 4, 1960.

THE COURT: Yes.

MR. FLYNN: A letter purporting to cancel their entire greement on the ground that the April of 1958 contract, or letter greement, contained a statement by the plaintiff that if the ansaction couldn't be completed, any monies paid by him were to returned to him.

This, it is our contention, was -- may be described as ying to lift oneself up by the bootstraps on the part of the fendant, as there was, right at the very time he was purporting cancel the contract by a 1958 sentence in a letter, there was existing and working arrangement for the completion of the ansaction by the lease mortgage arrangement I have described to e Court.

The plaintiff immediately notified defendant that his rported cancellation was of no effect, that there was a valid d existing contract between them, and the plaintiff demanded

erformance of the contract, the existing contract between them. laintiff's agent had approximately at the same time notified the efendant to come and sign the documents which would carry through he lease mortgage transaction to a conclusion. Plaintiff had otified the defendant and the defendant's representatives, or gents, that the $25,000 balance was ready for payment immediately, n accordance with any instructions they would give, and the laintiff demanded, as I say, performance on the part of the efendant, and tendered further performance on his own part.

In the course of the next several months the parties nd/or their counsel and representatives exchanged views and etters on the purported invalidity or the alleged validity or lleged invalidity of the contract between the parties. Demands or performance were continually made by and on behalf of the laintiff, and in either February or March of 1961 the then pending equest to the Governor of Tahiti for approval was granted. And n the ensuing weeks from and after March of 1961, representatives f the plaintiff continued preparation of documents which would hen effectuate the, what we might say, fee simple sale, as dis- nguished from the lease mortgage type of arrangement I have escribed, and again made demand on defendant for full performance, hich was refused, and which continued to be refused until the date, oday.

Plaintiff has at all times been ready and willing to erform fully, has made demands upon the defendant for such per- ormance, and demand has been refused.

APPENDIX B: Cross-Examination of Appellee Concerning Alleged "Deposit" of Purchase Money

CROSS-EXAMINATION (continued)

MR. CONKLIN:

Q Mr. Rosenthal, handing you Defendant's 4 and Defendant's Defendant's 5 was enclosed by you with Defendant's 4, isn't at correct?

A Excuse me. Would you ask that again.

Q Defendant's 5, that is the copy of the letter to Bishop nk, was enclosed by you as an enclosure in your letter, being fendant's 4, to Mr. Brangier, isn't that right?

A Yes.

Q Did you ever send the original of Defendant's 5 to shop Bank?

A I don't believe I did.

Q Did you ever deposit $25,000 with Bishop Bank in escrow the year 1958?

A No, I did not.

Q Did you ever deposit $25,000 with Bishop Bank in escrow any time?

A No, I did not.

Q Did you ever deposit $25,000 in escrow with the First tional Bank of Hawaii?

A No, I did not.

Q Did you ever deposit $25,000 in escrow with Milton Cades?

A No, I did not.

* * *

Q (By Mr. Conklin) Did you ever give -- and when I say give" I include the word send -- did you ever give Milton Cades escrow instructions?

A No, I don't think I ever did in the sense -- the true sense of the word.

Q You did deposit $25,000 with your attorney, Vincent Cullinan, didn't you?

A No, I did not.

Q Calling your attention again, Mr. Rosenthal, to the deposition taken in my office on November 30th and December 3rd, 1962, do you recall that that was just a week or ten days ago, isn't that correct?

A Yes.

Q And calling your attention to page 15 thereof, beginning line 6:

"Q But I believe you have testified that you know that the $25,000 was offered many times prior to May, 1961, is that correct?

"A Yes.

"Q Could you tell us when those times were?

"A I can't tell you exactly, but I wrote to Brangier and to Milton Cades and to Jean Solari, and I think that Jean told his colleague, LeJeune, who was the official representative, Mr. Solari, in order to transmit the same information to Brangier, that the money was available at any time, and I believe my attorney, Vincent Cullinan, advised Brangier and others concerned that the money was always available, in fact, on deposit with Cullinan himself, whenever necessary. I can't tell you the exact times but I

elieve it is in the correspondence."

you recall those questions and those answers?

A Yes, I do.

Q And your testimony today is that you did not deposit
he $25,000 with Vincent Cullinan, is that correct?

A That is true, but I had an arrangement with my banker
broker that Mr. Cullinan could draw $25,000 at any time. He
d this authority for a long, long time.

Q And this authority was not merely with regard to this
rticular transaction?

A It was with the special regard to this transaction. It
s an oral agreement, and I believe there was even a written
struction.

Q But he had such authority to withdraw your funds from
ur bank for a long, long, time, is that correct?

A Not from my bank, from my broker or banker.

Q For how long a period has that arrangement been in?

A Well, that is hard to say, because I have had the same
torney for many years.

Q Would you say ten years?

A Oh, I doubt that long. I would say five years, maybe
ven years.

Q You did deposit $25,000 with Jean Solari on Mary 26, 1961,
d you not?

A May what, please?

Q May 26, 1961.

A I don't know the date. I think it was prior to that.

Q Well, if I were to tell you that that was what you said
the deposition, would you say that was right?

A Yes, I would.

Q Would you like me to read the deposition to you where ou used that date?

A No, unless it has some significance.

Q Did you ever deposit $25,000 in escrow with any person ther than your own attorney or agent with regard to the Tahiti ransaction?

A Do you consider Solari my agent?

Q I do, within the framework of that question, yes, sir.

A Then I would say, no, I did not.

Q Did you ever deposit $25,000 in escrow with any person th regard to this Tahiti transaction?

A I deposited with Jean Solari and I made arrangements th my attorney, Vincent Cullinan, which was identical.

Q And your deposit with Solari was when he was acting s your representative in Tahiti, isn't that correct?

A That is correct.

Q So that you never deposited $25,000 with any person other han Solari, is that correct, with regard to this Tahiti trans- tion; is that correct?

A Well, I feel that my attorney, Vincent Cullinan, had hat same authority.

Q Did you ever deposit $25,000 with any person other than ean Solari with regard to the Tahiti transaction?

MR. FLYNN: That is the same question again, if the Court lease. The witness has answered it to the best of his ability. is argumentative now to keep repeating the same question.

THE COURT: It seems to me, Mr. Conklin, that he has pretty

oroughly covered the subject. He has covered the deposit in
y bank and he said he had what he claims to be an arrangement
th the attorney or broker, and he made a deposit with Solari.

MR. CONKLIN: Yes, sir, and then my next question was: "Have
u ever deposited the money with any other person?" And his
nswer was "I made arrangements with Vincent Cullinan." The
uestion was "Have you deposited with anyone other than Solari?"
has not answered that question, and that is why I repeated it.

THE COURT: You can answer it. I will overrule the
bjection.

THE WITNESS: In my opinion, all Vincent Cullinan had to
was pick up the telephone and he would have $25,000. That is
quivalent to a deposit in my opinion.

Q (By Mr. Conklin) Anyone else?

A No, no one else.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

FILED

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18799

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

Statement of the Pleadings.

By Indictment No. 31075, Appellant, along with David Anthony Harding and William Herbert Brining, was charged in Counts 1 and 5 of violation of 18 U. S. Code Section 471.

They were further charged in Counts 3, 4, 6 and 7 of violation of 18 U. S. Code Section 474. [1 C. T. pp. 2-8.]

Statement of the Case.

Appellant, along with the co-defendants, moved the court for suppression and exclusion of all counterfeit currency, plates, equipment, paraphernalia, papers, and all other articles and physical objects which on or about June 28, 1962 at the premises located at 3300 Atlantic Boulevard, Long Beach, California, which were unlawfully siezed and removed from said premises by agents

of the United States, and that the enumerated items be suppressed and excluded as evidence against said defendant.

Said motion was based upon the grounds that said items were illegally seized by means of an unlawful breaking into said premises by said agents against the will of appellant and without a search warrant; that the search and seizure were not an incident to a valid arrest, nor did said agents possess a warrant for appellant's arrest; that appellant's arrest was illegal; that there existed no probable cause to justify the illegal search and accompanying seizure of said items without a search warrant nor the arrest of appellant. [1 C. T. p. 19; 5 R. T. pp. 4 and 5.]

The hearing on said motion, originally scheduled for September 10, 1962 [1 C. T. p. 18], was continued to October 8 and 9, 1962 at which time evidence was introduced concerning the motion. [5 R. T.]

The matter was then taken under submission, and set down for ruling on October 15, 1963, at which time appellant's motion was denied. [1 C. T. pp. 38-40.]

The matter was continued for trial from time to time, on each occassion appellant renewing his objections to the introduction of evidence and renewing his motion to suppress the evidence.

Jury trial commenced March 12, 1963, and prior to the actual trial appellant moved the court to reconsider its ruling [2 R. T. p. 5], in order that there would not be a waiver of appellant's objection [2 R. T. p. 8, lines 13-19], and that the introduction of any counterfeit items at the trial would be deemed objected to, to which the court and government counsel agreed. [2 R. T. pp. 7-11.]

The objects seized on June 28, 1962 were admitted into evidence, and appellant was convicted on Counts 1, 3, 4, 5, 6 and 7 as charged in the Indictment. [1 C. T. p. 49.]

On April 15, 1963 Judgment was entered and sentence imposed against appellant the sentence being 5 years on each count, the sentences on all counts to run concurrently. [1 C. T. p. 50.] The two co-defendants were eventually acquitted.

Notice of Appeal was timely filed and the matter is now before this court [1 C. T. pp. 51-53], this court having jurisdiction of appeals from final decisions of the United States District Court pursuant to 28 U. S. C. 1291.

Statement of Facts.

(All of the references cited refer to the Second Supplemental Reporter's Transcript of proceedings had on October 8 and 9, 1962, and filed with this Honorable Court on August 19, 1963.)

It was stipulated that the government agents had neither a warrant for the arrest of either Newcomb or Brining nor a warrant to search the premises in which the contraband was discovered. [R. T. p. 6, lines 7-22.]

Kenneth Thompson, United States Secret Service Agent met an individual on June 27, 1962 at Stan's Playroom in the town of Maywood, California. [R. T. p. 10, lines 1-22, p. 23, lines 18-21.] Thompson had never met nor used this informant before, nor was he designated as a reliable informant by any other agent. [R. T. p. 27, line 14, to p. 28, line 12.] Another agent, Bill Sheridan, informed Thompson that an in-

dividual had telephoned the day before having knowledge of a counterfeiting operation in the Long Beach area, so Sheridan arranged the rendezuous between the individual and Thompson. [R. T. p. 29, line 2, to p. 30, line 2.]

The individual informed agent Thompson that the three defendants were counterfeiting ten dollar bills at Precision Products Company, 3330 S. Atlantic Ave. in Long Beach; that the company was engaged in the sale of doors, window sills, plywood and other construction items. He further described the vehicles each were driving, the address of David Harding, and the police record of Newcomb and Harding. [R. T. p. 10, line 23, to p. 12, line 12.] He further advised Thompson that Brining lived on Brookshire in Downey and that the exact address could be obtained from the telephone book, which Thompson verified from the telephone directory. They were not able to obtain the street number of Harding's address. He further informed Thompson that Newcomb and Harding had an apartment at 24 Sixth Place in Long Beach. The vehicle registrations were verified through the Department of Motor Vehicles as being registered to the respective defendants. [R. T. p. 12, line 13, to p. 14, line 18.]

On Cross-examination appellant inquired as to the name of the informant, whereupon the government objected and claimed a privilege not to disclose the identity of the informant, claiming he was a reliable informant. The government made no showing of any kind on what basis they wished to keep the informant's identity from being revealed. Further cross-examination established that this informant's reliability had not been established by his furnishing prior in-

formation. [R. T. p. 24, line 4, to p. 28, line 12.] The court then sustained the objection and permitted the government not to disclose the informant. [R. T. p. 39, lines 6-8.]

Appellant then inquired, "Mr. Thompson, did this informer tell you that he had seen any paraphernalia, plates, or counterfeit money, at the premises owned by Mr. Newcomb?" [R. T. p. 38, lines 9-11], to which the government objected. Although the court overruled their objection on two occasions [R. T. p. 38, line 18; p. 14, line 14], the government kept refusing to accept the ruling and presented a lengthy argument to the court, wherein the U. S. Attorney stated, "The government agrees that this man does not have any prior or previous reliability as far as the government is concerned;" [R. T. p. 43, lines 13-15], yet pressed the objection on the basis of the question being immaterial.

In reply appellant stated,

> "This afternoon counsel has presented a heretofore unknown principle of law, that where a person testified to material information on direct examination that the defendant should be precluded from cross-examining.
>
> We are not asking whether this informant had a conversation with Mr. Thompson about movies or baseball or anything else than directly connected with the activities of my client, Mr. Newcomb.
>
> He testified on his direct examination as to a conversation with that informant. I am entitled by any objective standards to go into that conversation relating to the transaction, the activities going on at 3330 Long Beach Boulevard, and in-

volving Mr. Newcomb, definitely." [R. T. p. 45, line 15, to p. 46, line 2.]

The objection was eventually sustained by the court [R. T. p. 55, lines 11-25], and appellant was not permitted to discover the basis on which the informant arrived at his conclusion.

At approximately 9:00 P.M. on the evening of June 27, 1962 agent Thompson, Weaver and Sheridan drove to the apartment at 24 Sixth Place in Long Beach, where they observed Newcomb and Brining moving a cardboard box onto Brining's truck, which Brining drove away. They neither followed either of the two defendants to the apartment, their names were not found on the mail box, nor did the agents inquire of the apartment manager as to whether they resided there. [R. T. p. 14, line 15, to p. 15, line 22; p. 58, line 4, to p. 60, line 2.]

During the latter part of that afternoon agent Darwin Horn telephoned Carpenter's Printing Company speaking to Ray Blair, inquiring as to whether there were any records of paper purchases by Precision Products of Long Beach. After the company records were checked Floyd Ellis called him back and stated that Mr. Newcomb of Precision Products had made purchases of several types of paper on various dates, on May 11th purchasing 1000 sheets of 8½x11 No. 20 Lancaster, 100 per cent rag bond paper. This type of paper closely approximated the paper used in U. S. currency stock. [R. T. pp. 137-145.]

At 8:00 A.M. the following morning agents Thompson and Sheridan arrived at Precision Products and placed the building under surveillance, agents Weaver

and Horn having arrived approximately a half hour earlier. Newcomb's car was parked in front of the building. Shortly thereafter Newcomb went to his vehicle, removed a small box therefrom, and returned to Precision Products. At approximately 9:45 A.M. Brining arrived, the door was unlocked, and Brining entered the building. Twenty minutes later Newcomb left the building, leaving the door ajar, and walked to the mail box, whereafter he returned to the building. [R. T. p. 16, line 20, to p. 20, line 20.]

Thompson then went to a telephone booth and called the United States Attorney and gave him the facts so they could prepare an affidavit and take it to the Commissioner to see if a search warrant could be issued. No arrangements had been made as to how the warrant would be picked up or delivered to Thompson in the event it would have been issued. It was decided by the agents that they would keep the building staked out and leave everything alone unless it appeared that the people inside were going to *permanently* move out and not be expected to return. [R. T. p. 21, lines 2-9; p. 65, line 6, to p. 66, line 22.]

It was during this telephone conversation that Newcomb was arrested by agent Sheridan. Weaver testified that Newcomb came out and put an object on the passenger side of the vehicle and then got into the driver's side of the vehicle. Horn was stationed at the rear of the building. Weaver and Sheridan rushed up to the car and Sheridan placed Newcomb under arrest, handcuffing him in the vehicle. None of the agents checked the material on the front seat of the vehicle prior to entering the premises. Weaver then tried the front door by rattling it, and did not knock

nor announce that he was a federal officer. He then went back to Newcomb to obtain the keys for the purpose of entering, when Brining pushed the drapes aside to look out of the window. Thereupon, he broke down the door and entered the premises, with agent Horn following behind him, having come from his position at the rear of the building. [R. T. p. 184, line 10, to p. 188, line 23; p. 195, lines 15-24; p. 199, line 7, to p. 201, line 24.]

Brining was seated at a desk in the front office, and was placed under arrest by agent Horn. [R. T. p. 172, lines 4-24.]

None of the agents had bothered to look through the high rear window adjacent to the alley entrance prior to entering the building.

When Newcomb was out on the parking lot in his vehicle there was no illegal activity of any kind. [R. T. p. 211, lines 5-8.]

Upon entering the building they entered the front office portion and were unable to see what was in the rear of the premises because of the partition and the doors. It was not until they unlocked the darkroom door in the rear portion of the premises that they found anything of an illegal nature. It was necessary for agent Horn to use either a screwdriver or knife to gain entrance to the darkroom [R. T. p. 209, lines 4-25; p. 212, lines 6-21; p. 191, lines 9-19], whereupon the contraband was discovered.

Assignment of Error and Argument.

The evidence introduced against appellant was obtained as a result of an unlawful search and seizure, not incident to a valid arrest, and should have been excluded from evidence.

Appellant incorporates by reference as though fully set forth herein the Memorandum of Points and Authorities filed with the trial court. [1 C. T. pp. 20-22.]

The requirement for a warrant to conduct a search stems not only from the Fourth Amendment to the United States Constitution, but also from Rule 41 of the Federal Rules of Criminal Procedure.

In the instant case it was stipulated that the federal agents had neither a warrant for the arrest of Newcomb nor a warrant to search the premises.

According to the doctrine of *United States v. Jeffers,* 342 U. S. 48, 72 S. Ct. 93, in order to justify a search being made without a warrant exceptional circumstances must exist and then the burden is on those seeking the exemption to show the need for it.

Appellant respectfully urges that the government has not established probable cause for the arrest and the accompanying search. What constitutes probable cause is, of course, largely a factual matter. Appellant will not belabor the point by a repetition of the facts heretofore set forth, but stresses their inadaquacy to establish probable cause.

First of all, the government refused to reveal the identity of the informant on the basis that he was a reliable informant. [R. T. p. 25, line 23, to p. 26, line 7.] After extensive cross-examination the government conceded he was not a reliable informant but merely a "tipster". [R. T. p. 49, lines 12-17.] Appellant was precluded from any further inquiry as to the identity of the tipster or the information supplied by him to the federal agent.

All of the information, other than his conclusion regarding counterfeiting, concerned the occupations,

residences, place of business, type of vehicles and former criminal records. These factors could easily be supplied by *anyone* even slightly familiar with the appellant. Practically everyone in society has an occupation, a place of business and a residence. The additional item of a criminal record is of little consequence. The information supplied by the "tipster" is not sufficently substantial to overcome the requirement of disclosure.

Costello v. United States, 298 F. 2d 99;
Cochran v. United States, 291 F. 2d 633;
Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623.

The evidence apart from the communication of the "tipster" obtained by the agents consisted entirely of acts which were not illegal. In fact, at the very moment of the arrest of Newcomb the government agent who arrested him stated he observed no illegal activity of any kind. [R. T. p. 211, lines 5-8.]

The fact that probable cause did not exist at the time of the arrest is emphatically demonstrated by the testimony of the agent in charge, Kenneth Thompson. In his own mind he knew that he did not have a sufficient basis for arresting Newcomb, so he telephoned a United States Attorney to see if a warrant could be obtained from the Commissioner. Thompson had instructed the agents to make no moves unless the people inside were going to *permanently* move out and not be expected to return. [R. T. p. 21, lines 2-9; p. 65, line 6, to p. 66, line 22.] While Thompson was attempting to go through proper legal channels, two of the officers, Weaver and Sheridan, *in his absence,* became overzealous and impulsively made the arrest, along with breaking the door down. It is difficult to conceive

of a clearer example of impatience on the part of law enforcement officers with proper and constitutional, although admittedly inconvenient, procedure.

In the rather extensive arguments in the trial court this aspect was brought up in appellant's argument, and yet *the government was unable to answer it.* Appellant again raised the issue at the conclusion of the governments argument, providing a further opportunity to the government to do. It still went unanswered. [R. T. p. 269, line 13, to p. 270, line 2.]

Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, held that where there was no suspect fleeting or likely to take flight, nor evidence or contraband being threatened with removal or destruction, and the search was of a permanent building as contrasted with a movable vehicle, plus the fact that the evidence seized would not have perished from the delay of getting a warrant, show that exceptional circumstances did not exist to justify a search without a warrant.

Conclusion.

Wherefore, in view of the foregoing, Appellant respectfully requests that the Judgment of Convictions on all counts be reversed and that said charges against him be ordered dismissed.

Respectfully submitted,
PAUL AUGUSTINE, JR.,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL AUGUSTINE, JR.
Attorney for Appellant.

No. 18791

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18791

IN THE

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STERLING EDWARD NEWCOMB,

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

Appellant Sterling Edward Newcomb, together with William H. Brining and David A. Harding, were indicted June 31, 1962, for violation of Title 18, United States Code, Section 471 and for violation of Title 18, United States Code, Section 474. On March 15, 1963 the appellant was convicted after a jury trial; appellant was sentenced to 5 years in the custody of the attorney general April 16, 1963.

A timely notice of appeal was filed by appellant on April 19, 1963.

The jurisdiction of the District Court is predicated upon Title 18, United States Code, Section 3231.

This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II.
STATEMENT OF THE CASE.

In June, 1962, appellant Sterling Edward Newcomb, David Anthony Harding, and William Herbert Brining were indicted by the Federal Grand Jury for the Southern District of California; Counts One and Five charged a violation of 18 United States Code, Section 471, counterfeiting Federal Reserve Notes; Counts Three, Four, Six and Seven charged a violation of Title 18, United States Code, Section 474, possession of counterfeit notes, plates and photographing and printing $10 and $20 Federal Reserve Notes. Appellant was not charged in Count Two.

On August 2, 1962, the appellant was arraigned and entered a plea of not guilty. On October 8, 1962, a hearing on the motion to suppress evidence commenced. The hearing lasted two days, and on October 15, 1962, the court made the following findings and order:

> "The Court finds that the arresting officers were justified in relying upon the information furnished by the informer, who, though not known to the officers as a reliable informant at the time the information was given, was subsequently, but before the arrest, corroborated to such extent as to prove reasonably reliable. The informer told the officers that defendants were engaged in counterfeiting at the place of business of the Precision Products Company; that such Company was located at a certain address and purported to manufacture wooden doors; the names and descriptions of each of the defendants; the home addresses of two defendants; a description of the cars of two of the defendants.

"With the exception of the statement that defendants were engaged in counterfeiting, all other information furnished by the informer was checked and found to be accurate. But the officers went further in their investigation and found that at least one of the defendants was working late and unusual hours at this place of business, which was not consistent with the normal requirements of such a business; that at a time when such a business would normally be open for customers, the defendants were carefully keeping the front door of the building locked, unlocking it only to permit one of their number to leave and then immediately relocking it; that one of the defendants was purchasing, in the name of the company, paper stock of a quality and quantity not normally used in the type of business carried on by the Precision Products Company; but which was suitable for counterfeiting; that at least two of the defendants had prior felony convictions and that one of the defendants was a printer.

"Even if the reliability of the informer were in doubt, the tip given by him, together with the subsequent investigation made by the arresting officer prior to the time of the arrest, was sufficient to constitute probable cause of the arrest.

"The Court therefore finds the arrest lawful.

"There having been a lawful arrest, the search which followed was also lawful as incident to the arrest. The breaking down the door and the search of the entire building were justifiable under the circumstances here existing in that having been compelled to show their hand by making the first

arrest and especially after having seen the furtive glance of one inside the building peering through the drapes, the officers were justified in following up as quickly as possible in order to obtain evidence lest it be destroyed. Having entered, the search of the entire building—which incidentally is a commercial establishment and not a residence—the Court finds to be justifiable and therefor lawful."

On March 15, 1963, after a four day jury trial, the appellant was found guilty. The jury deadlocked when one of the jurors became ill before a verdict could be reached as to the co-defendants, with the exception that as to count two, co-defendant Brining was found not guilty. The court declared a mistrial on all counts as to co-defendant Harding, and the remaining counts as to co-defendant Brining.

III.

STATEMENT OF THE FACTS.

On June 27, 1962, at about 2:00 P.M., Secret Service Agent Kenneth Thompson, met with an unidentified person in a drive-in restaurant. [R. T. 11, 23, 24.][1] This person hereinafter referred to as the informant, told Agent Thompson that David Harding, William Brining, and appellant were counterfeiting $10 bills at Precision Products Company, 3330 South Atlantic Avenue in Long Beach [R. T. 10-11], and that the operation had been in progress for two to three months. He also stated that Precision Products Company was a business engaged in the sale of doors, window sills, plywood and other construction items. [R. T. 11.]

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[1]Reporter's Transcript.

The informant described to Agent Thompson the individuals involved, and the types, years, and colors of the vehicles that they were driving; that appellant was driving a 1961 Corvair Monza, bronze colored, two-door; that Brining was driving a white 1962 Chevrolet pickup truck, without license plates, and that Harding had a blue 1961 Corvan in addition to several other cars. [R. T. 11-12.] He also related that two of the people he described had police records.

The informant stated that Brining was assisting the appellant who was printing the notes; that Brining had a financial interest in the counterfeiting operation. [R. T. 80-81.]

Informed of the meeting by Agent Thompson, Agent Darwin Horn, on June 27, 1962, contacted the Carpenter Paper Company in Long Beach, California, and was advised that Precision Products, under the name of the appellant, had purchased a 1,000 sheets of 8½ by 11, No. 20 Lancaster, 100% rag bond paper on May 11, 1963. [R. T. 138-139.]

At about 5:30 P.M., of the same day, Secret Service Agents took up surveillance at Precision Products and remained there until 1:30 A.M. [R. T. 112.] Agent Thompson observed a night light shining through a curtain which appeared to emanate from a fluorescent table lamp. [R. T. 103.]

At about 9:30 P.M. that evening, Agent Thompson, with three other agents, went to an apartment house at 24 Sixth Place in Long Beach, while two agents remained at the stake out at Precision Products. [R. T. 64.] Agent Thompson observed a Chevrolet pickup truck, without license plates, in the underground garage

at that address. The appellant and Brining were seen moving a large cardboard box from the stair well to the pickup truck and a short time later Brining drove the pickup truck away. Agent Thompson testified that he knew the man was Brining because he was so described earlier by the informant who had also advised that the appellant and Harding had an apartment at the Sixth Place address. [R. T. 14-15.]

Agent Horn, on the same evening, checked the Police records relative to the appellant and Harding. He advised Agent Thompson that appellant had been convicted of robbery and served a five to life sentence; that he had another sentence of six months to 50 years for statutory rape; and that his occupation at the time of arrest by the Long Beach Police Department was lithographer. [R. T. 22.] It was also determined that the records at the Los Angeles County Sheriff's Office showed that Harding had a felony conviction for burglary in 1952. [R. T. 21.]

On June 28, 1962, Agents Thompson, Horn, Weaver and Sheridan took up surveillance at 8:00 A.M., across from Precision Products at 3330 Atlantic Boulevard. Agents Horn and Thompson posed as salesmen in a nearby car agency, and the two other agents occupied a deserted building located about 50 feet from the front door of Precision Products. [R. T. 16-17.] Agent Thompson noted that there was a large sliding door and a smaller door in the rear of the Precision Products Building, and one front door. [R. T. 17.] The windows at the rear were 12 feet above the ground, and the front windows were heavily draped. [R. T. 213.] When the agents arrived, the 1961 Corvair Monza was already in a parking lot at the front of the building, just to the

north of the entrance door. A check of the license number was made with the Department of Motor Vehicles and it was found to be registered to the appellant. Shortly after surveillance began, the appellant was observed exiting from the front door, walking to the Corvair Monza, removing a small box and going back into the building. The door appeared to be locked and had to be unlocked before the appellant could re-enter. [R. T. 19.]

At approximately 9:45 A.M., Brining drove up in the Chevrolet pickup, parked the vehicle and went into Precision Products. The door had to be unlocked before Brining could enter. [R. T. 19-20.]

Precision Products did not appear open for business from 8:00 A.M., to the time of the arrest later that morning. The only persons observed entering the building or leaving the building were the appellant and Brining. [R. T. 20.] About 20 minutes after Brining arrived, the appellant left the building and walked to a mail box. [R. T. 20.] Shortly thereafter, Agent Thompson went to a nearby telephone to call an Assistant United States Attorney to obtain a search warrant. [R. T. 21, 65.] It was agreed that while Agent Thompson was making the call, no action would be taken unless the persons in the building were leaving and not expected to return. [R. T. 21.] Agent Thompson advised the Assistant U. S. Attorney of the plan, and provided him with the known facts in order to obtain a search warrant. [R. T. 65.] He requested that an affidavit for a search warrant be prepared. [R. T. 63.]

While Agent Thompson was conversing with the United States Attorney's office, the appellant was arrested by Agent Sheridan as he entered his vehicle in

front of Precision Products. Appellant had opened the passenger side of the vehicle and placed something inside and then walked around the car, getting in the driver's side. In accordance with a prearranged plan, Agent Sheridan went around on the driver's side and Agent Weaver proceeded up to the passenger's side; Agent Sheridan then placed the appellant under arrest [R. T. 184-185]; and Agent Horn rushed to the rear of the building. [R. T. 169.]

Immediately after the arrest of appellant, Agent Weaver tried the front door—rattling it. He informed Agent Sheridan that the door was locked and the keys to the building were requested from the appellant. [R. T. 188.] Agent Sheridan then shouted, "He is looking out of the window." [R. T. 185.] The person inside the building had pulled the drape aside, looked out, quickly replacing the drapes in a closed position. [R. T. 187.] He could observe the arrest of Newcomb, who at that moment was being placed under arrest while seated behind the wheel of his car. Newcomb's hands were raised to his eye level, as Sheridan handcuffed him. [R. T. 197, 203.]

Agent Weaver then went back to the building and pushed the door open. [R. T. 185.] He entered Precision Products, observed Brining at a desk in the front room and told him he was under arrest. [R. T. 208, 216.] Agent Horn was right behind him having returned from the rear of the building. [R. T. 169.]

The front office was about 10 by 20 feet, and partitioned off except for a door that led into the back portion of the building. [R. T. 174.] Agent Weaver entered the rear area of the building where he observed a camera and a printing press. [R. T. 216, 217.] A

small room was located at the rear, but the door was either stuck or locked. [R. T. 217.] Agent Weaver testified that he believed someone might be in that room [R. T. 218], as he had observed a third person in the vicinity of the building earlier that morning and thought he had entered Precision Products from the rear door. [R. T. 182.] The appellant was brought into the back room and advised the agents that the door sometimes sticks and a knife or screw driver was required to get in. Entry was eventually made to the dark room and the counterfeit currency found there. [R. T. 191.]

The arrests of both the appellant and Brining on June 28, 1962, were made without warrants, and the subsequent search of the premises located at 3330 Atlantic Boulevard was not pursuant to a search warrant. [R. T. 6.]

IV.
ARGUMENT.

1. The Trial Court Properly Held That the Search and Seizure at the Business Address of Precision Products Was Legal and Incidental to a Lawful Arrest and the Property Obtained Was Properly Admitted During the Course of the Trial.

That the premises may be searched incidental to a lawful arrest cannot be questioned.

United States v. Rabinowitz, 339 U. S. 56, 66 (1950);

Harris v. United States, 331 U. S. 145 (1947);

Agnello v. United States, 269 U. S. 20, 25 (1925);

Carroll v. United States, 267 U. S. 132, 158 (1925);

Abel v. United States, 258 F. 2d 485 (2nd Cir., 1958), 362 U. S. 217 (1960);

Marron v. United States, 8 F. 2d 251, 254 (9th Cir., 1925).

The Supreme Court in *Harris v. United States, supra,* held, at page 150:

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of search warrant. Search and seizure incidental to a lawful arrest is a practice of ancient origin (citation) and has long been an integral part of the law-enforcement procedures of the United States . . ."

In the *Carroll* case, *supra,* the court said:

> "When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." (P. 158)

This Circuit held in *Marron v. United States, supra,* page 254:

> ". . . The right of search extends to the premises in control of the defendant arrested, and authorizes the seizure of that which is evidentiary of the crime." (Citations).

The arrests of appellant and Brining were made without warrants of arrest. [R. T. 6.] It is clear that a secret service officer may arrest without a warrant and conduct a search incidental thereto if he has probable cause within the meaning of the Fourth Amendment, and United States Code, Title 18, Sec. 3056.

Draper v. United States, 358 U. S. 310 (1959);

Agnello v. United States, supra;

Weeks v. United States, 232 U. S. 383, 392 (1914).

Title 18, *United States Code, Section 3056,* which authorizes Secret Service agents to arrest, reads in pertinent part:

> ". . . the United States Secret Service, Treasury Department, is authorized to . . . detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations and securities of the United States. . . ."

Appellant contends that the court after hearing the evidence and arguments of counsel, erred in denying appellant's motion to suppress the evidence seized. To support this contention appellant urges the Government did not establish probable cause for the arrests. Appellant sets forth two points in his argument: (1) The Government refused to reveal the identity of the informant and (2) That the evidence apart from the communication of the informant, who was not previously known to be reliable, consisted entirely of acts which were not illegal.

Information was received on June 27, 1962 by the Secret Service from an informant that the appellant with two other persons, David Harding and William Brining, were counterfeiting $10 bills at Precision Products Company, 3330 South Atlantic Avenue in Long Beach. [R. T. 10-11.] They were also advised that the appellant was the one who was printing the notes and that Brining had a financial interest in the operation. [R. T. 80-81.]

Although this informant was not previously known to the Secret Service officers [R. T. 28], it is not essential that such person be of known reliability at the time when the information is conveyed; his information is deemed reasonably reliable if there is sufficient corroboration prior to the arrest. In a recent Ninth Circuit case, *Rodgers v. United States,* 267 F. 2d 79 (1959), the court said, at page 88:

> "The reliability of the informant may be established either before the officer's given the information leading to the arrest, or after receiving the information which ultimately leads to the arrest by investigation and corroboration of the in-

formation so received, so long as at the time of the arrest the officer has probable cause to believe his informant."

The following information was provided by the informant and corroborated by investigating officers prior to the arrest of the appellant and Brining at Precision Products on June 28, 1962:

(1) That Appellant Newcomb was driving a '61 Corvair Monza; that Brining was driving a white 1962 Chevrolet pick-up; without license plates, and that Harding had a blue '61 Corvan. [R. T. 12.]

A blue '61 Corvan was observed parked across the street from Precision Products the night of June 27, 1962 and was found to be registered to David Harding. [R. T. 13, 104.] When Secret Service Agents arrived at Precision Products at 8:00 A.M., June 28, 1962, they observed a 1961 Corvair Monza in front of the building and determined it to be registered to the appellant. [R. T. 13.] In the evening of June 27th Agent Thompson had observed Brining, whom he identified from a description provided by the informant, load a box into a 1962 pick-up without license plates and drive away from 24 6th Place in Long Beach. The agent also recognized appellant at that address. [R. T. 14-15.] The physical description of both of these men was provided by the informant. [R. T. 11.] It is to be noted the informant had also advised that Harding and the appellant had an apartment at this address.

(2) That two of the individuals he described had police records. [R. T. 12.]

On the evening of June 27th, Agent Horn checked the record of the appellant at the Long Beach Police

Department and found that he had been convicted of robbery and served a five to life sentence; that he had another sentence of six months to 50 years for statutory rape and that his occupation at the time of the arrest by the Long Beach Police Department was lithographer. Los Angeles County Sheriff's Office records disclosed that Harding had been convicted of a felony for burglary. [R. T. 21-22.]

(3) That the counterfeiting operation at Precision Products had been in operation from two to three months. [R. T. 11.] This information was substantiated by the fact that appellant's purchase of several types of paper on May 11, 1962 from Carpenter Paper Company included 1000 sheets of 8½ x 11 No. 20 Lancaster 100% rag bond paper [R. T. 139], which closely simulates paper used in United States currency. [R. T. 131.] Later the same month, appellant purchased 2,500 sheets of 8½ by 11, 25% rag bond (Ivory) paper. [R. T. 140.] It was the testimony of Agent Horn that many counterfeiters will print their notes on both 100% and 25% rag bond paper. [R. T. 143.]

(4) That of the three, appellant was the one who printed the counterfeit notes. [R. T. 80-81.] Corroborating this is the fact that the appellant is listed in the police records at Long Beach as a lithographer. Agent Thompson testified that a lithographer is a printer. [R. T. 22.]

Observations by the investigating officers not only gave them probable cause to believe the informant at the time of the arrests, but, in addition, when considered with the "tip" alone were sufficient to lead the officers to reasonably conclude that appellant was committing

the crime of counterfeiting U. S. currency. Note the purchase of No. 20 Lancaster 100% rag bond paper. Agent Horn, a special agent for the secret service for eleven years and a participant in over one hundred counterfeiting investigations [R. T. 137, 140], testified that the purchase of 100% rag bond would indicate that further investigation should be made of the purchaser of the paper. [R. T. 140, 175.] Agent Horn reasoned: "Well, this type of paper, of course, is a very fine, good type of paper. Has a body to it that will stand up. Not as good as the paper that our currency is produced on, but it will stand up almost as well as any type of paper that is produced in a similar thickness of our currency. In other words, this—if you are going to counterfeit bills, this would probably be the best type of paper to obtain." [R. T. 140, 141.] Agent Thompson when asked why the purchase of 100% rag bond aroused his interest, testified:

> "Well, this is about as close as you can come to duplicating the genuine paper that U. S. currency is printed on, which is a hundred percent rag content. It is also a very expensive paper, costing much more than, say, even a 25% rag bond, and its just not commonly used." [R. T. 115.]

Thompson also stated that as a matter of general procedure, Secret Service has requested that paper supply houses notify the agency when a person who is not known to them as a reliable printer in a legitimate business makes a purchase of 100% rag paper. [R. T. 115.] A routine check is made of every paper manufacturing house in the Los Angeles area periodically by the Secret Service. [R. T. 31.] As the agents had information that the business of Precision Products

Company was the sale of doors, window sills and other plywood construction items [R. T. 11], it was reasonable that they investigate further.

The reasonableness of the agents' conclusions regarding the purchase of 100% rag bond, was supported by the testimony of William Reymer, sales supervisor for Carpenter Paper Company for eleven years, who testified that 100% rag bond paper is used legitimately for engraved letterheads, bonds and certificates and is ordered only by engravers and stationers because of the considerable cost. [R. T. 122-123.] He also testified in response to an inquiry by appellant, that 100% rag bond would be the closest thing you could find to United States currency.

Possessing the information provided by the informant, police records, and Carpenter Paper Company, the agents took up surveillance at 5:30 P.M., June 27, 1962, at Precision Products, 3330 Atlantic Boulevard in Long Beach. [R. T. 112.] The agents observed a night light shining through a curtain, apparantly emanating from a fluorescent table lamp. [R. T. 103.] They also observed Harding's Corvan parked across the street. Several of the agents, including Agent Thompson, then drove to an address at 24 Sixth Place in Long Beach where the informant had said the appellant and Harding had an apartment. They arrived about 9:30 P.M., drove into the underground garage, and observed the appellant and Brining moving a large cardboard box from the stairwell to the Chevrolet pick-up. After the box was loaded, Brining then drove away and Thompson attempted to follow but was unable to do so.

Surveillance at Precision Products, discontinued at 1.00 A.M. June 28, 1962, began again at 8:00 A.M.

that same morning [R. T. 16, 17.] Unable to look inside the building, as the windows in the rear were twelve feet above the ground and those in the front were heavily draped, the agents kept watch for any suspicious activity that might take place outside. [R. T. 17.] The Corvair Monza belonging to the appellant was already parked in front of Precision Products near the entrance door. Later, appellant was observed leaving the building by the front door, walking to his vehicle where he left a small box. He returned to the building, unlocked the door and re-entered. [R. T. 19.] At about 9:45 A.M., Brining arrived in the Chevrolet pick-up, and entered the building after the door was unlocked from the inside. [R. T. 20.] Agents observed no one else entering or leaving the building with the exception that Agent Weaver saw a third person in the vicinity of the rear of the building. He was unable to determine whether or not this person had entered the building. [R. T. 182.]

Under these circumstances, the conclusion that the appellant and Brining, having closed down Precision Products to the public, were preparing to leave permanently was certainly reasonable. If they had been permitted to leave and thereafter distributed the counterfeit money, then not only would the incriminating evidence be destroyed, but the ever present fear that the counterfeit money would get into circulation would then be an established fact. A later arrest of the appellant and his associate would have been a hollow victory for law inforcement, indeed.

Although facts may be subject to several interpretations this does not prevent, in itself, a conclusion by

investigating officers from being reasonable. As stated in *Rodgers v. United States, supra,* page 88:

> "Even though there might be other reasonable explanations for this attempted concealment still the inference that defendants were engaged in a crime was just as reasonable."

The arrest of Newcomb came first. Appellant had gone to his vehicle, placed something inside, and entered the vehicle on the driver's side. In accordance with a prearranged plan, Agent Sheridan went around on the driver's side and arrested the appellant. [R. T. 184.] Agent Horn rushed to the rear of the building also in accordance with the plan. [R. T. 169.] At this moment, Agent Thompson was calling the U. S. Attorney's office in Los Angeles to provide him with the facts for a search warrant. [R. T. 63.] Prior to his departure, Agent Thompson had agreed with the other agents present, that no arrests were to be made during his absence unless it appeared that either appellant or Brining was leaving. Appellant contends that Agents Weaver and Sheridan in the absence of Thompson, became overzealous and made the arrest and subsequent entry into the building. The contrary is true, as the agents were operating in conformance with a plan agreed upon with Thompson, and in making the arrests followed a procedure already formulated. Appellant urges further that Thompson, in calling the U. S. Attorney, knew that he did not have sufficient basis for arresting the appellant. This assumption is erroneous. Agent Thompson testified that the purpose for contacting the U. S. Attorney, was to provide him with facts necessary to obtain a search warrant. [R. T. 65.] If Thompson had not believed he had suf-

ficient probable cause, certainly he would not request a warrant, nor absent himself from the surveillance at such an unpropitious time.

Whether or not a search warrant was obtained by the officers is not a controlling factor in determining the validity of the search. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search is reasonable.

In 1950, the Supreme Court, ruling on the reasonableness of a search without a warrant, incident to a lawful arrest, in *United States v. Rabinowitz, supra,* said, at page 66:

> ". . . to the extent that *Trupiano v. United States* requires a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, the case is overruled."

Brining could observe the arrest of appellant which occurred directly in front of the window from which he was looking. The appellant's hands, upheld while being handcuffed, were visible to Brining. The fact that Brining realized what was transpiring is evident from his quick movement in closing the drapes. Agent Weaver, having rattled the front door and found it to be locked, was walking toward the Newcomb vehicle to obtain the keys when he saw Brining make his momentary appearance at the front window. [R. T. 187, 188.] Aware that the building had a rear exit, from which Brining might escape, Weaver pushed open the nearby front door. Brining seated at a desk in the front room was immediately placed under arrest. [R. T. 185, 188.]

Agents Weaver and Horn then entered the rear of the Precision Products building, which was partitioned off from the front office area, and observed a printing press and camera. Agent Weaver testified that everything was available to conduct counterfeiting. [R. T. 216-218.] A darkroom was then located at the rear, and eventually opened by Agent Horn was found to contain the counterfeit currency.

The entry of Weaver, by forcing the front door, was reasonable under the circumstances. Brining could have escaped through the rear door, or attempted to destroy the counterfeit money. Weaver also testified he thought perhaps there was a third person in the building whose appearance matched the description of Harding. Well aware of the record of Harding for a felony conviction of burglary, Agent Weaver certainly could not be expected to give any further advance notice of the presence of the officers. In any case, Brining already knew of the officers presence from what he had observed when he looked from the window. Appellee submits that the agents acted as reasonable men under the circumstances and that the arrests were valid.

> "The scope of the word 'reasonable' must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution 'against unreasonable searches and seizures'. Obviously what is 'reasonable' must be judged against a background of the facts known to the particular agent at the time of the arrest. . . ."
>
> *United States v. Vokell,* 251 F. 2d 333 (2d Cir. 1958), at page 336.

In the *Vokell* case, narcotics agents acting under the authority of Title 26, United States Code, 7607(2),

without a warrant of arrest or a search warrant, entered defendant's apartment via the fire escape, through an open window and arrested the defendant and searched the premises.

When Secret Service Agents, acting under the authority of a similar statute, Title 18, United States Code, Section 3056, arrested the appellant and Brining, the informant had been proved to be reliable and this alone was sufficient probable cause. In a similar case, *Rodgers v. United States, supra,* the informant provided information that his wife, together with the appellant's wife, were at the Greyhound Bus Station in San Diego and that appellant's wife had in her possession heroin. The appellant denied this and stated that his wife was in the bus station in Los Angeles. The officers corroborated the statements of the informant, finding the wife where he said she would be. The creditability of the informant was also supported by the fact that he bore 'marks' appearing to be a user of narcotics. Having found the informant reasonably reliable by the time of the arrest, the court at page 88, stated:

> "In determining whether reasonable grounds exist the rules cannot be hard and fast, but must as we have said depend upon all the circumstances. For this reason we cannot accept appellant's argument that an arresting officer must always know in advance that his informant is reliable. Whether the reliability is established before the officer is given the information or thereafter, the effect is the same so long as at the time of the arrest the officer has reasonable grounds to believe his informant. Otherwise it makes little difference when the officer became aware of such grounds."

The court, in determining whether the officers acted reasonably, pointed out:

> "However, in determining whether or not these facts establish probable cause depends only upon whether the inferences which the agents drew from them are reasonable. While the standards imposed to determine probable cause for arrest seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, they also seek to give fair leeway for enforcing the law and the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part but the mistakes must be those of reasonable men acting on facts leading sensibly to their conclusion of probability . . ." (P. 88.)

In the instant case, the agents not only had an informant who had proved to be reliable, they had in their possession additional facts which in themselves made the arrest lawful. The court so found. [R. T. 38, 39.] It is for the trial court, the trier of fact, to determine the weight and credibility of the evidence. Its finding established that the Government had proved sufficient probable cause for the arrest. It is a basic rule of law that the finding must be sustained if there is substantial evidence.

2. The Non-Disclosure of the Identity of the Informant Was Proper.

The privilege not to disclose the identity of an informant belongs to the Government and is based upon a public policy of long standing to protect those persons who come forward to provide information "leading to the detection of crime and the apprehension of the criminal."

> *United States v. Rugendorf,* 316 F. 2d 589 (7th Cir. 1963).

See also:

> *United States v. Li Fat Tong,* 152 F. 2d 650 (2d Cir. 1945);
>
> *Scher v. United States,* 305 U. S. 251 (6th Cir. 1938);
>
> *McInes v. United States,* 62 F. 2d 181 (9th Cir. 1932), cert. den. 288 U. S. 616 (1933).

In *Roviaro v. United States,* 353 U. S. 53, the court held that:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law."

The court, however, found an exception in that "where the disclosure of an informer's identity or the contents of his communication, is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way." The court did state that it believed there was no fixed rule with respect to whether a disclosure is justifiable or not but that the problem calls for balancing the pub-

lic interest and protecting the flow of information against the individual's right to prepare his defense. The *Roviaro* case involved a special employee of the Bureau of Narcotics who was actually involved in the commission of the offense. In fact, he was the only witness who could have disclosed entrapment if there was any. The present case is readily distinguishable from the *Roviaro* case in that the informant was not named in the indictment, and did not participate in the offense. He is therefore not material to the defense of the appellant.

In distinguishing *Roviaro,* the court in *Miller v. United States,* 273 F. 2d 279 (8th Cir. 1959), the court held:

> "We think that the circumstances of this case differ crucially from those cases in which disclosure was required. . . . We are not dealing with one who was an active participant in the crime . . . and who would have been able to testify directly about the very transaction that constitutes the crime. . . ."

There, the informant supplied information to officers that an automobile of a particular make, model and year would be coming from a location having a reputation for moonshine activity and that it would be driven by the defendant or another white male carrying untaxed whiskey. It is to be noted that the court also found probable cause on the basis of the information provided by the informant.

The determination of the validity of an arrest was held to be essential to the proper disposition of a case, in *Costello v. United States,* 298 F. 2d 99 (9th

Cir. 1962). The court cites in support of this holding, *Wilson v. United States,* 59 F. 2d 390 (3d Cir. 1932), which cited with approval *Roviaro v. United States, supra.* The Costello court, in requiring the disclosure of the name of the informant, stated that when the customary check for the magistrate yields to the necessity of quick action,

> "the courts then exercise a post-arrest check on the actual existence of that probable cause. This latter check would not be effective if it looked no further than the uncorroborated tip of anonymous informant. . . . It is enough to observe that in this situation a reasonable opportunity for the appellant to challenge the reliability of an informant must be permitted or no real judicial check would ever take place."

The court refused to compel the disclosure of the name of the informant.

In *United States v. Whiting,* 311 F. 2d 191 (4th Cir. 1962), the court stated that the *Roviaro* case did not apply where the attorney for the defendant wanted the names of the informers "in support of the effort to invalidate the search warrant and not to help the defendant's presentation of their case."

The *Roviaro* case was considered further in *Bruner v. United States,* 293 F. 2d 621 (5th Cir. 1961) where the court held, at page 62:

> "On the question as to whether the Government should have been required to disclose the identity of the informer, it seems now to be settled that such disclosure cannot be required unless it is relevant and helpful to the defense of the accused or essential to a fair determination of the cause. . . . Nothing in the record before us shows any need for requiring a disclosure to be made."

In *Costello,* the court, concerned primarily with the question of probable cause, required the disclosure of the informant's name as there was no corroboration of the information which he provided. In the case before us, however, revealing the informant, and requiring that he take the stand and subject himself to defense counsel examination, is not necessary to permit an adequate check on the police officers making the arrest. The facts which provide sufficient corroboration to make the informant reliable at the time of the arrest, were the result of personal observations of the investigating officers and, therefore, the personal credibility of the informant, who was neither known to be either reliable or unreliable at the time he gave the information, is not in issue and would add nothing material to the proper disposition of the case.

V.
CONCLUSION.

It is respectfully submitted that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

ROBERT H. FILSINGER,
Assistant U. S. Attorney,

Attorneys for Appellees,
United States of America.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Robert H. Filsinger

NO. 18791

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO.

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

BY STERLING EDWARD NEWCOMB

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NO. 18791

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

BY STERLING EDWARD NEWCOMB

TO THE HONORABLE JUDGES OF THE

ABOVE-ENTITLED COURT:

COMES NOW the appellant STERLING EDWARD NEWCOMB and respectfully petitions the above-entitled court for a rehearing as to him, and urges:

I

THE EVIDENCE (CONTRABAND) WAS RECEIVED IN EVIDENCE OVER OBJECTION AND WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE AND NOT INCIDENT TO A VALID ARREST.

A. Subsidiary to this is the finding by both the trial court and this court that the evidence or information in possession of the officers at the time of the arrest and the search was sufficient. With all due deference to the court, the evidence in possession of the officers at the time, and summarized in the margin of this court's opinion, was not enough to outweigh the protection afforded by the Fourth and Fifth Amendments to the federal constitution.

There was no warrant of arrest and no search warrant.

B. Lacking a warrant of arrest and search warrant, the officer apparently in charge of the case was actually attempting to contact the United States Attorney about obtaining a search warrant - when the other officers, we contend, without reasonable cause therefor "jumped the gun" and made the arrest of appellant, your petitioner. No one was fleeing the scene, nor was there any basis for belief on the part of the officers that any evidence was to be or was being destroyed.

C. Further subsidiary to the question is the fact that "The government agrees that this man (informant) does not have any prior or previous reliability as far as the government is concerned." (R. T. p. 43, ll. 13 - 15.)

D. Further subsidiary to the question is the proposition that the informant was not known to be reliable. A reliable informant means a person whose information has in the past led the police to valid suspects. Such is not the case here. And in view of what the officers knew at the time of the arrest and search, it may be said it is only in the case of a pressing emergency that an arrest or search

without a warrant may be justified based upon information secured from an informant or from an informant not known to the officer to be reliable.

E. In connection with this, may we point out that the appellant was entitled to know, by way of cross examination (which is recognized as one of the most powerful weapons in the possession of a defendant), what information the informant had, who he was, upon what did he base his statements that "counterfeiting" was going on at a certain location and was being conducted by the appellant and others. They had a right to know who he was, and whether or not he was actually a participant, and what consideration had been given to him. This was denied to the appellant; and this, we respectfully urge, was serious error which should be given further consideration by this court.

CONCLUSION

The appellant respectfully asserts that this appears to be a case where both the trial court and this court have put the stamp of approval upon the proposition long since outlawed: "Did they have the evidence," NOT "How did they get it." And we again respectfully assert that it appears to us that both the trial court and this court have overlooked the proposition: "A search is not to be made legal by what it turns up." The appeal to necessity is not justified in this case.

U. S. v. Dire, 332 U. S. 581 - 594.

In asking for a rehearing, may we suggest that the basic constitutional question of search and seizure and the application of the Fourth and Fifth Amendments would warrant this case being referred to the court for hearing en bank.

We respectfully ask for a rehearing.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Appellant,
Petitioner Herein
Sterling Edward Newcomb.

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for the Appellant NEWCOMB, do hereby certify that, in my opinion, the Petition for Rehearing is well founded, and that it is not interposed for delay.

I further certify that I have been asked to file this petition by the appellant and his attorney of record Paul Augustine.

DATED at Los Angeles, California, this 4th day of March, 1964.

Russell E. Parsons

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles 13, California, that on March 4, 1964, I served the within PETITION FOR REHEARING BY STERLING EDWARD NEWCOMB on the following named parties by depositing the designated copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
Sixth Floor, Federal Building
Los Angeles, California
(3 copies)

FRANK H. SCHMID, ESQ.
Clerk, U. S. Court of Appeals
For the Ninth Circuit
Post Office Box 547
San Francisco, California
(Orig. & 20 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 1964, at Los Angeles, California.

M. A. Standefer
Signature

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

DAVID NEILL MAC MURRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 18792

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of three years. [R. 9]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the

* R refers to the typed Transcript of Record.

prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R. 10]

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 562 (Universal Military Training and Service Act) for refusing to submit to induction. [R. 2]

Appellant pleaded Not Guilty, waived jury trial and was tried on April 8, 1963. [R. 9] He was convicted by Judge William C. Mathes on April 22, 1963, and sentenced by him on said date. [R. 9] On said latter date appellant filed his Notice of Appeal. [R. 10]

Before Plea a Motion to Dismiss Indictment was filed, argued and denied. [R. 4] At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied. [R. 6].

THE FACTS

Appellant registered with Local Board No. 84 on February 1, 1957. [Ex. 2]** He filed his 8-page Classification Questionnaire on July 3, 1958 [Ex. 6-14] and indicated in it that he was a conscientious objector to war. [Ex. 8]

** Ex. refers to the Government's exhibit, the selective service file of appellant.

The pagination is at the bottom of each sheet of the exhibit, circled.

On June 26, 1958 he fully executed and timely filed the Special Form for Conscientious Objector when it was sent him by the Board. On its front page he signed the declaration that indicated his conscientious objection to participation in military activity was total and he crossed out the portion that would constitute a claim for a non-combatant classification. [Ex. 16] When confronted with question one: "Do you believe in a Supreme Being?" he marked the box for NO. [Ex. 16] In response to question four which asked appellant to give the name and present address of the individual upon whom he relies most for religious guidance, he stated "I rely on myself for my religious guidance." [Ex. 17] In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a very creative person being a poet, musician, and writer. I am a very sensitive person completely intolerant of violence and destructive measures." [Ex. 17] The Special Form also asked Are you a member of a religious sect or organization? He answered "NO". [Ex. 18]

Appellant was classified by his Local Board in Class I-A on February 10, 1960 [Ex. 13], and, when he did not appear for a scheduled Appearance Before Local Board his file was sent to the Appeal Board which kept him in the same classification. [Ex. 13] The United States Attorney and the Attorney General agreed, in the words of the latter, that: "By denying belief in a Supreme Being and assert-

ing that his belief is based upon 'the makeup of his personality and mind', the registrant has removed himself from consideration as a conscientious objector within the meaning of Section 6 (j). See *U. S.* v. *Bendik*, 220 F.2d 249 (2d Cir. 1955), *U. S.* v. *DeLime*, 223 F.2d 96 (3d Cir. 1955), *Davidson* v. *U. S.*, 218 F.2d 609 (9th Cir. 1954); Cert. granted 349 U.S. 918 (1955); Court of Appeals judgment vacated and cause remanded; conviction affirmed 225 F.2d 836 (9th Cir. 1955); cert. denied 350 U.S. 887 (1955), *Clark* v. *U. S.*, 236 F.2d 13 (9th Cir. 1956)." [Ex. 43]

On July 24, 1963 he wrote the Board that he desired to expand and clarify his evidence (Ex. 72-75); he did this but the Board refused to reopen his classification and on November 26th he refused to submit to induction. [Ex. 86]

QUESTIONS PRESENTED AND HOW RAISED

I

The evidence shows appellant did not receive the FBI investigation, the Department of Justice hearing, or its report and recommendation on his appeal to the Appeal Board and that the reason was the United States Attorney's refusal to accord him these appellate steps because appellant did not believe in a Supreme Being. [Ex. 41]

The question presented is whether appellant was illegally deprived of the named appellate steps, as raised in Motion for Judgment of Acquittal. [R. 6]

II

The record shows that appellant was not considered eligible for a conscientious objector classification because

he did not believe in a Supreme Being, as required by the Act.

The question presented is whether the Act discriminates against religions and religious persons who do not express themselves in such orthodox terms, as raised by the Motion. [R. 8]

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motions for judgment of acquittal.

II

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I

The Act and the Regulations mandatorily provide that, upon administrative appeals involving claims of conscientious objectors, certain procedures be followed.

The decision of the United States Attorney to deprive appellant of the FBI investigation, the Hearing Officer hearing, and the recommendations to the Attorney General and the Appeal Board was illegal.

II

Congress has required that a registrant, professing to be a conscientious objector to war show certain qualifica-

tions to be entitled to a conscientious objector classification: he must believe in a Supreme Being and his beliefs must be "religious" and not be a "merely personal moral code."

The Supreme Being requirement offends the Constitution:

> The VIth Article (3rd clause) provides that no religious test shall ever be used as a qualification for any political office. The Supreme Being clause, nevertheless, makes it impossible for many truly religious citizens to qualify for a conscientious objector classification; inevitably, their religious scruples make felons out of them, as the law now stands, and they are thereafter disqualified for public office.
>
> The First Amendment provides that Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.
>
> The Supreme Being clause is an establishment of the religious views of the majority:
>
> Congress has no right to legislate what is and what is not religious belief.
>
> Finally, a registrant may have religious beliefs, meeting all reasonable standards, even though he does not believe in a Supreme Being.

ARGUMENT

I.

Appellant Was Illegally Deprived of His Right to an Investigation, Hearing, Report and Recommendation, upon His Administrative Appeal.

We argue that the draft board lost jurisdiction to order appellant to report for induction because he was denied procedural due process of law in that the Department of Justice illegally deprived him of his right to an investigation, hearing, report and recommendation upon his claim for classification as a conscientious objector, contrary to Section 1626.25 of the Selective Service Regulations and Section 6(j) of the Act.

A. Act and Regulations involved.

Section 6(j) of the act reads in part:

> "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the president, or (2) if the objector is found to be conscien-

tiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

The regulations [32 C.F.R.] provide:

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the

appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written

reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The Appeal Board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

The denial of a hearing provided for by the regulations is a denial of due process: *United States* v. *Peterson,* 53 F. Supp. 760 (N.D. Calif. S.D.); *United States* v. *Laier,* 52 F. Supp. 392 (N.D. Calif. S.D.); *United States* v. *Fry,* 203 F.2d 638 (2nd Cir.); *Davis* v. *United States,* 199 F.2d 689 (6th Cir.); Compare *Knox* v. *United States,* 200 F.2d 398 (9th Cir.); see also *United States* v. *Frank,* 114 F. Supp. 949 and *Sterrett* v. *United States,* 9 Cir., 1954, 216 F.2d 659.

The hearing and ancillary benefits of the Act and regulation above quoted were denied appellant solely because of the blocking action of the United States Attorney [Ex. 43]. The problem, therefore, is whether the action of the United States Attorney was erroneous and contrary to the Act and the regulation. If all registrants claiming a conscientious objector classification are entitled. when timely

perfecting an administrative appeal, to have the special appellate procedures prescribed by Congress, then appellant was denied procedural due process.

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14) provides:

> "Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces.
>
> "(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:
>
> " 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

Section 1623.2 of the regulations (32 C.F.R. § 1632.2) provides:

> "Consideration of Classes.—Every registrant shall be placed in Class I-A under the provisions of Section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered

the highest class and Class I-C considered the lowest class, according to the following table:

Class:	I-A-O	Class:	IV-A
	I-O		IV-B
	I-S		IV-C
	II-A		IV-D
	II-C		IV-F
	II-S		V-A
	I-D		I-W
	III-A		I-C"

Appellant was denied the conscientious objector status by the appeal board on August 18, 1960 [Ex. 13] and the Department of Justice returned the file to it *without* an investigation and hearing; the appeal board again denied Mac Murray the conscientious objector status on March 23, 1961 [Ex. 13]. This action of the Department conflicted with the express provisions of the Selective Service Regulations then in existence. These regulations made it mandatory that the appeal involving conscientious objections be referred to the Department of Justice *for inquiry and hearing.*

The appeal board made a preliminary determination that the conscientious objector claim be denied. The entry of this determination in the minutes made it mandatory according to Section 1626.25 of the regulations that the Department of Justice procedure be followed. The United States Attorney illegally defied Section 6(j) of the act and the regulations, Section 1626.25.

The Act and the regulations made the Department of Justice procedure mandatory. The return of the file to the

appeal board without investigation prejudiced the appellant. It denied him the full and fair hearing required by the regulations. See *Sterrett, supra.*

An inspection of the act and regulations shows this was a positive and injurious denial of the conscientious objector procedure guaranteed by the act and Section 1626.25 (b) of the regulations.

"Shall" is used in the sentence of the act commanding the inquiry and hearing. This is followed by the word "refer". Following the word "refer" are the words "any such claim." "Any such claim" means any conscientious objector claim. This would mean that if an appeal had any conscientious objector claim in it, it would be the duty of the appeal board to refer it to the Department of Justice.

B. Legislative History.

It is helpful in understanding the conscientious objector provisions of the Act to consider the background of the prior Acts. The 1951 and 1948 Acts being identical to the 1940 Act in most respects, it is necessary to consider the history of the 1940 Act along with the history of the 1948 Act. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, indeed, under Section VI, discussing Section 6(j) of the act, said concerning conscientious objection: "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 Act."

The report on the 1948 Act says that it is exactly like the 1940 Act. This means that the same statutory con-

struction that prevailed under the 1940 Act should be followed for the 1948 Act.

In 1940, the "Statement of the managers on the part of the House" in making their conference report on September 12, 1940, shows there was an original plan to refer the conscientious objector cases by the local board to the Department of Justice. The House amendment was accepted by the joint conference and an agreement reached that the conscientious objector classification would be first determined by the local board with the right of appeal. Among other things, the conference report reads:

> "* * * Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the objections."—86 Cong. Rec. 12038, 76th Congress, Third Session.

The report made to the House was also made to the Senate on the next day.—See Hearings on Senate Bill 4164, 86 Cong. Rec. 12082, 76th Congress, Third Session.

The House Report No. 2947 to accompany Senate Bill 4164 dated September 14, 1940, states under "Conscientious Objectors":

> "After appropriate inquiry by the appropriate agency of the Department of Justice, a hearing was held by the Department of Justice in the case of each such person with respect to the character and good faith of his objections."—See pages 17-18, House Re-

port No. 2947, 76th Congress, Third Session, September 14, 1940.

The Senate Report No. 2002, on Senate Bill 4164, dated August 5, 1940, reads as follows:

> "The measure is *fair* both to a person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objection to war is or is not a bona fide conscientious objector. * * * The rights of a concientious objector and of the government are fully protected against possible local prejudice, influence, or passion, by provision for appeal to a board of appeal." (Emphasis added.)—See Senate Report No. 2002, 76th Congress, Third Session, p. 9.

C. Administrative Construction.

Historically, it was always the view of the Department of Justice and the Selective Service System that the Selective Training and Service Act of 1940, required a reference to the Department of Justice for investigation and hearing in every case where the appeal board did not sustain the conscientious objector classification.

National Director of Selective Service, General Lewis B. Hershey, in the publication entitled "Conscientious Objection" said:

> "The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation.

> This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation and hearing. * * *" (Emphasis added)—See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 147, 150, 155, Washington, Government Printing Office, 1950.

Subsequently, in 1952, the Department of Justice changed its construction of the statute and sought an amendment to the regulations, dispensing with the reference to the Department of Justice *where the local board gives the I-O classification,* (see *Sterrett, supra*) obviously for the purpose of lightening the burden of the Department of Justice. On July 3, 1952, it secured such a change, but subsequently (doubtless because of the *Sterrett* decision on October 25, 1954, and the *Gonzales* decision on March 14, 1955, 75 S. Ct. 409) had the regulation changed back. At present, as before July 3, 1952, the Appeal Board has two chances at the conscientious objector-appellant's classification, all as set forth in the regulations reproduced at the beginning of this argument. To round out the history of change, although it doesn't concern our main problem, it should be noted, in passing that in 1956, the then current version of § 1626.25 required that the appeal board send the file to the Department for the special appellate procedures as soon as it appeared the appeal involved a conscientious objector claim, but that in 1957, this regulation was changed back to the original, 1948 version, and that this has been the procedure ever since.

It is clear the department still wants to get out of investigating as many of these cases as possible. It thinks it sees a loophole by reading into the statute something that is not there. Although some courts have condoned this we contend the Government ought to produce something from Congress authorizing this change. The Department of Justice cannot do so. Its failure proves that it is trying to amend the statute and make it different from what Congress intended. The fact that the executive order, at the time of Sterrett's case incorporated the departmental interpretation of the act into the regulations did not make it valid. That amended regulation, by executive order, flew into the teeth of the act of Congress and this court so held. See *Sterrett*, 664-665.

We urge that the position currently taken by the Department of Justice is unreasonable just as the changed regulation resulting from the executive order of the President, at the time of Sterrett was held unreasonable by this court [664-665]. The over-all purpose of Congress in dealing with the conscientious objectors must be considered.

It is beyond dispute that Congress intended to exempt all conscientious objectors found by final determination to be such. The congressional report on the 1940 Act shows an intent to have the Department of Justice investigate every case where there is any question about the conscientious objector status. The intent to have the investigation is not hinged on the type of appeal that was taken. Congress knew that when an appeal was taken there would be a completely *de novo* consideration of the conscientious objector problem.

It is apparent Congress knew that the local boards would not have the final say in all cases. It knew that appeals would be taken. In fact the act provides for appeals generally.

The Act of Congress, Section 10(b), provides for the boards. Section 10(b)(3) in particular mentions the local boards and appeal boards. Section 6(j) deals specifically with conscientious objectors, including procedure on appeal. The sentence in that section of the act, reading "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board," is mere surplusage. The registrant would have the right to take an appeal in any event under the act. It merely recognizes that he has the right to take an appeal like all other registrants. The conscientious objector is not limited in taking an appeal claiming other grounds. This provision of the act was merely to ensure that the conscientious objector had the right to appeal from the denial of the claim.

We contend that the controlling sentence is the one following the one above quoted, namely, "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." The words "such appeal", cannot be reasonably interpreted to mean "only in event he appeals from a denial of the conscientious objector claim." The sentence says that upon the filing of the appeal the appeal board shall refer any such claim to the Department of Justice. If Congress intended to limit "such claim" it would have said so. The

proper interpretation of this sentence is that whenever any appeal taken to the appeal board involves the conscientious objector claim, "such claim" must be referred to the Department of Justice for inquiry and hearing unless the appeal board grants the complete conscientious objector classification immediately upon taking the appeal.

The taking of the appeal from any local board classification for all practical purposes constituted an obliteration of that classification regardless of what the classification may have been. This would put the registrant in the same position before the appeal board as before the local board before any classification. Now with the registrant standing in this unclothed position before the appeal board and with the appeal board having doubt or intending to deny the conscientious objector classification, it would be plain that Congress intended that there would be an investigation and hearing by the Department of Justice.

We argue that the only way that this conclusion can be escaped is to have something specific in the act which would command that there be no investigation in such circumstance.

The reasonableness of this interpretation and the unreasonableness of the construction placed upon the act by the Government, is manifest, we believe. Otherwise, it would put Congress in an incongruous positon. It would mean that the appeal board and the Department of Justice would have greater authority than the local board, thus making the law inconsistent. The appeal board and the Department have no greater authority than the local board so far as classification is concerned. Congress was

after the facts on claims involving conscientious objectors. Congress did not empower the Department to determine the facts *without* the special appellate procedures. The only way the facts could be obtained was to refer the matter to the Department of Justice *for* the special appellate procedures. The very purpose of the Department of Justice investigation was to protect the Government against malingerers *and* to insure the *bona fide* conscientious objector against arbitrary and capricious denials. If the local boards were not permitted by Congress to exercise arbitrary and capricious power, then certainly neither the Department nor the boards of appeal were intended by Congress to have such power.

It should be remembered that the investigation and hearing in the Department of Justice is not only for the benefit of the Government. It also is for the benefit of the registrant. The appeal board is entitled to know all the facts about "any such claim." A registrant is entitled to have the claim developed in the Department of Justice if it is not to be granted by the draft boards—either local or appeal.

It is unreasonable to say that Congress intended to make the safety and welfare of the conscientious objector before the appeal board dependent on whether the Department looked with favor on the claim. Since the appeal board has no greater authority than the local board, the logical consequence is that the hearing in the Department of Justice must be had.

It is desirable to look further into the history of the various bills that were proposed to Congress. The original

(1940) Burke-Wadsworth Bill had in mind that every conscientious objector claim be investigated by the Department of Justice as soon as the claim was made to the local board. That procedure, if made the law, would have required every claim filed with the local board to be investigated by the FBI. This 1940 bill was objected to in Congress and finally a compromise was reached whereby the reference to the Department of Justice was provided for when the conscientious objector claim reached the appeal board. If Congress intended that originally all such claims be investigated by the Department of Justice before the local board passed on the claim then the change of the original bill to require the appropriate inquiry and hearing in the Department of Justice after an appeal to the appeal board would indicate that Congress had in mind the same type of investigation being made in every case after the claim reached the appeal board.

In any event Congress intended in the original bill that every conscientious objector claim that was questioned by the local board should be investigated by the Department of Justice. If this was the intention of Congress then when this investigation was transferred from the local board to the appeal board in the final conference report of the two joint committees of Congress in 1940, it would also indicate that Congress intended that there should be an investigation where the appeal board or anyone questioned the claim. In other words, if Congress intended an investigation if the local board denied the claim, by force of the same reasoning the subsequent bill transferring the investigation to the appeal board would mean that the appeal board's tentative denial would require the investigation too.

The sentence of the act immediately preceding the sentence providing for the inquiry and hearing is merely declaratory of the rights of the registrant to an appeal. It merely iterates for the conscientious objector the right of appeal that is granted all registrants under the act. If the sentence is interpreted in this way, the sentence that follows about inquiry and hearing means that there should be an investigation and hearing following the filing of such appeal. "Such appeal" means an appeal by a conscientious objector or by a person having "such claim" as a conscientious objector. The word "appeal" used in the sentence is not in any way qualified. Since the right to the investigation flows from the taking of the appeal, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of the appeal board classification.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction over him. There is a great difference between the scope of review for the purpose of upsetting a determination by a draft boad and the scope of review of the determination of some other administrative agencies. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the Estep case, 327 U.S. 114, 123, 66 S. Ct. 423 (1946).) Notwithstanding this limitation placed on the judicial review of an administrative determination, the fact remains that procedural due process of law must be strictly adhered

to. The rule is stated in *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F.2d 444, 446, that where the scope of review is very narrow and restricted, then the need is greater for an insistence on strict compliance with the procedural provisions. This is true even in draft cases. (See *Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F.2d 876, 881 and *United States* v. *Zieber,* 3rd Cir., 1947, 161 F.2d 90, 92.) These cases hold that there must be a full and strict compliance with the procedural provisions. There are many other cases involving procedural violations that support this rule.

It is submitted that the failure to conduct an investigation, make a report after an oral hearing and send a recommendation to the appeal board by the Department of Justice deprived appellant of his procedural rights contrary to Section 6(j) of the act and Section 1626.25 of the regulations.

II.

The Act Discriminates Against Religions and Religious Persons Who Do Not Express Themselves in Orthodox Terms and Is Constitutionally Offensive.

The draft laws since 1948 contain an innovation. The so-called "Supreme Being" clause is not found in the 1940 or 1917 draft laws.

A. The Statute Involved.

Section 6(j) of the Selective Service Act of 1948, as amended (62 Stat. 604, 50 U.S.C., App. 98), also known now as the Universal Military Training and Service Act,

as amended in 1951, 65 Stat. 75, 50 U.S.C.A., Appendix is the section. The part pertinent to our point is:

> "Nothing contained in this title [this appendix] shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code."

B. Mac Murray's Sincerity Not Questioned.

Appellant Mac Murray considers himself a conscientious objector to war. The record is clear [Ex. 8, 16-19, etc.] Additionally, there is nothing in the record reflecting adversely on his sincerity or truthfulness. Nor is there anything to show that his conduct does not conform to his subjective views. See *Witmer* v. *United States,* 75 S. Ct. 392 (1955) at 395. While it is correct to test a registrant's sincerity by his conduct, other elements, such as sweetness of personality, etc., are immaterial. See *Annett* v. *United States,* 10 Cir., 1953, 205 F.2d 689, 692, where the court frowned on the use of immaterial elements in classification decisions [Annett had been found to lack humility].

Before the present act (and its 1948 predecessor) the draft laws required only "religious training and belief." The construction given this phrase by some courts, notably the Second Circuit is considered the reason Congress added the so-called Supreme Being clause, in 1948. Specifically,

Philips v. *Downer,* 1943, 135 F.2d 521 and *U.S.* v. *Kauten,* 1943, 133 F.2d 703. In this latter case the Hearing Officer had found:

> "The registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.
>
> "There is no doubt that the registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political." [Footnote 2, p. 707).

The court concluded that:

> "The record contained substantial indications that the objections were not because of 'religious training and belief' in the sense those words are used in the statute, and the weight of the evidence was a matter for the Appeal Board.
>
> "[12] For the foregoing reasons we find no error in the decision of the trial court and the judgment of conviction is accordingly affirmed." [708].

Nevertheless, in the *Philips* case the same court found there was a sufficiently different set of facts to reach an opposite conclusion, just as we contend here. The registrant Philips had introduced in evidence a play he had written and the decision largely turned on its interpretation.

The court stated:

> "In view of the weight given in these procedings to this play, we shall need to discuss it below. Unless it justifies a different result it seems clear that the

draftee had shown himself a conscientious objector within the statutory meaning as defined in the Kauten case and was entitled to exemption as such, so long at least as the principles there announced stand as the authoritative interpretation of the Act. It is to be noted that the facts differ from those upon which we relied in the Kauten case as an alternative ground for affirmance of the conviction there. For here the opposition to war was a deep-seated one applying to war in general and was not based upon political objections to this particular war." [523]

C. The First Amendment Is Offended.

In this particular argument we are not discussing whether, in the draft law Congress was required to exempt conscientious objectors from the operation of the law, or whether the requirement of "religious" belief is constitutional. We are discussing here the fact that Congress did exempt conscientious objectors who, by reason of religious training and belief, are conscientiously opposed to war in any form and then went on, contrary to the prohibition of the First Amendment, to (a) include as religious only those believing in a Supreme Being and (b) to exclude from the meaning of "religion" a particular type of belief, namely, a religious belief based on political, sociological, philosophical, or moral tenets as distinguished from a belief in a Supreme Being. By so circumscribing what religion shall mean Congress did the very thing which the prohibition of the First Amendment sought to prevent. It made "a law *respecting an establishment* of religion." And if Congress didn't intend this the fact remains that it has been so construed [and/or misused] by the Department

of Justice and the Selective Service System. Had Congress merely stated that conscientious objectors, who by reason of religious training and belief were conscientiously opposed to war in any form, were to be exempt, a totally different problem would be involved. But Congress did not do this; it set forth its own meaning as to what religion is. This it had no power to do.

This principle of constitutional law is clearly set forth by the Supreme Court in *United States* v. *Ballard,* 322 U.S. 78, 86:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * * Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education v. Barnett, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs * * * The fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state * * * The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

The establishment clause does not merely prohibit an "establishment"; it forbids any "law *respecting* an estab-

lishment" (emphasis added). Thus, even if we assume that "establishment" has the limited meaning the critics of the recent "prayer" case (*Engel* v. *Vitale,* 370 U.S. 421) give it, the prohibition in the establishment clause still appears to be substantially broader in scope than those critics imply.

Then, too, it is at least very doubtful that "establishment" meant to the founding fathers what these latter-day semanticists claim. In his "Memorial and Remonstrance against Religious Assessments", the man who is credited with having the largest part in the writing of the establishment clause, James Madison, repeatedly used the word "establishment" to describe what was essentially only a tax bill imposing a relatively small assessment on each citizen of Virginia to raise money to support "teachers" of the religion of his choice.

William J. Butler, in an article entitled The Regents' Prayer Case: In the Establishment Clause "No Means No" in the May, 1963 issue of American Bar Association Journal says:

> "The author of the establishment clause interpreted its language very broadly. In the same session of Congress in which the Bill of Rights was passed, Madison opposed the inclusion in the first census bill of a provision for the listing of occupations on the ground that such provision would require the enumeration of clergymen and would, therefore, violate the prohibition that 'Congress shall make no law respecting an establishment of religion'! "

The Congress, in our draft law, did the very thing that was forbidden to it. Indeed, Congress seems to recognize

that political, sociological, or philosophical views or a personal moral code may be a religion but it specifically prohibited that kind of religion from protection. This it cannot do.

As was said in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *"

The Congress, therefore, by attempting to set up an orthodoxy in religion has exceeded the salutary restraining bounds of the First Amendment for to allow Congress to define or limit religion in any particular act or measure is an opening wedge to permit Congress to define in greater detail and on subsequent occasions the nature of religion and its practice.

D. The VIth Article, 3rd Clause Is Offended.

We assert that the Supreme Being clause of the draft law offends the VIth Article (3rd Clause) of the Constitution.

> "* * *; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

This point was also raised recently in *Torcaso* v. *Watkins,* 81 S. Ct. 1680 (1961), but was not passed on "because we are reversing the judgment on other grounds * * *" (n. 1, p. 1680). Torcaso had been refused a notary commission because he refused to declare his belief in the existence of God.

It is a matter of common knowledge to all who have dealt with conscientious objectors that they prefer prison to surrendering their scruples, thereby becoming felons and ineligible for public office.

Estep v. *United States,* 327 U.S. 114, and many dozen of the Court's cases.

In California and in most, if not all the states, a man convicted of a felony cannot hold public office.

California Penal Code, § 2600.

A test, based on religion, that a portion of the population cannot meet, is a test proscribed by the VIth Amendment. Here, the test in effect condemns such a person to a felon's disabilities.

The Supreme Being clause accomplishes indirectly what is prohibited to be done directly.

Its eventual effect is to effectively prevent all conscientious objector males who do not believe in a Supreme Being from qualifying for public office.

In *U. S.* v. *American Brewing Co.,* 296 Fed. 772, 776, the opinion reads:

> "Surely no one would so construe Article VI that the prohibition of a religious test applied only to officers named by the President, or the head of a department * * *"

E. The First Amendment Protects the Free Exercise of Individual Religious Belief.

Not only "an establishment of religion", but also "the free exercise" of religion, is the plain meaning of the pro-

hibition of the First Amendment. For, if the second clause could be thought to mean only "the free exercise of an establishment of religion," that would be a tautology, a superfluity, not adding anything but being sufficiently included in the first clause "respecting an establishment of religion." By the usual rule of construction, that specific terms prevail over general ones, if the second clause is not distinct and independent of the preceding clause, it could be a limitation thereof and restrict its application. But rather, the rule of *ejusdem generis,* as here applicable, does not have a narrowing affect, but the constitutional provision is enlarged to protect the individual as well as the collective right of religious freedom. Therefore this appellant as a religious conscientious objector should have the protective right about him of the First Amendment.

As to principles of construction see:

U. S. v. *Gallililand,* 312 U.S. 89, 61 S. Ct. 518, 85 L. Ed. 598.

Badger v. *Hoidale,* 88 F.2d 208, 109 A.L.R. 798.

Such a construction of the constitutional amendment appeals to the religious sense, for then it protects the most cherished and sacred of religious convictions, that of belief regardless of church, institution, or establishment. There is almost no religion, sect or denomination, which does not regard as more sacred one's inner beliefs than his outward conformity to a particular cult, group, or incorporation of institutional worship. The function of the religious institution is largely for the support, protection and encouragement of the individual or personal faith. For example, the most august of religious institutions by virtue

of age and number of communicants in the Western world, the Roman Catholic Church, does not disparage but glorifies such individual faith within its own.

What then of the churchless man whose religious convictions may be as intense and sincere as any of a numerous body of believers? Does the Constitution deny him the protection of religious freedom? Not as we construe the First Amendment. His right is as jealously safeguarded as any. Here the rights of all are the rights of every one.

The importance of this issue is even more impressive when we reflect that 64 million Americans are reported to have no membership in any church or religious institution. Many, probably most of them in our experience, have a religion of some sort, and a considerable number of them do not believe in a Supreme Being. It is said especially of the more educated ones, a large percentage have none of the usual religious beliefs, such as of deity and immortality, but who nevertheless are conscious of profound religious feeling. A larger number still of these have religio-metaphysical beliefs which do not accord with orthodox conceptions such as are incorporated in this Act.

Perhaps the following excerpt from Arthur E. Briggs' "Walt Whitman: Thinker and Artist" may give a clearer conception of a religious humanism which is neither theistic nor atheistic but is highly individuated:

> "To those who assume that religion is inextricably joined with notions of God and immortality, which had a special unorthodox significance for Whitman,

> it may be important that they were a self-conscious expression of his religion. But it should also be remarked with Elton Trueblood that 'religion is not so much finding God, as reaction to the reality which has found us? More correctly it may be said, that religion is the reality which we have discovered in and through ourselves, which is the substance of the faith and the sustaining beliefs we have. Religion is the human faith by which we live and work, and it is stronger as it exists without external objects or gods or God or immortality or life beyond this one as the contents of its beliefs."

Whitman did not believe in churches, but he believed in men, and that is doubtless the belief of far more religious persons than is commonly supposed.

Interpretation of the First Amendment as protection to the free exercise of the religion of each and every man should be of special value at this time when the United States is so deeply involved in promoting harmonious relations with all peoples. For it must be remembered, as shown elsewhere in this brief and as pointed out in the enlightened opinion of Justice Peters in *Fellowship of Humanity* v. *Alameda County,* 153 Cal. App. 2d 673, 315 P.2d 394, that the more populous religions of the world do not profess belief in a Supreme Being. It therefore behooves the United States of America to stand for religious freedom as a basic principle of our Constitution.

In *Torcasso* v. *Watkins,* 367 U.S. 488, 81 S. Ct. 1680, as we forecast the implicit meaning of that great decision, neither State nor Federal Government can constitutionally establish a religious test for any immunity or privilege

of a citizen of the United States. But such being the effect of the provision of the Draft Act which gives a special privilege and immunity to conscientious objectors who believe in a Supreme Being, in that respect that provision is unconstitutional by reason of attempting to impose a religious test upon such privilege or immunity in contravention of the First Amendment.

F. The Supreme Being Clause Imposes an Arbitrary and Unconstitutional Test for Religious Belief.

Finally, we argue that one may have religious belief even though he does not believe in a Supreme Being, and bases his belief on "philosophical" or moral tenets.

The history of religions and the writings of scholars in the field quickly permit us to list religions claiming over half the people of the world as denying a Supreme Being or grounding belief on philosophical-moral tenets.

Thus the eminent scholar, Max Muller, has said:

> "* * * if an historical study of religion had taught us * * * one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many auto de fé." Natural Religion, p. 228.

Most of the admittedly great religions of the world claiming many millions of followers actually *deny* the existence of a Supreme Being. Thus in Hastings, Encyclopaedia of Religion and Ethics 183, Buddhism is said to be "radically adverse to the idea of a Supreme Being—of a God, in the Western sense of the word." And the same work at page 185, quotes extensively from Hindu literature

to demonstrate that the Sankhya School of that religion positively denies this existence of God. Confucianism substitutes the concept of "Heaven" or "Sky" for God and makes its tenet "li" or the doctrine of philosophical-moral order. Lin Yutang in his Wisdom of China and India points out "Among the Chinese scholars, Confucianism is known as the religion of moral order." (p. 811). Typical Confucian sayings are: "Heaven sees as my people see, Heaven hears as my people hear," (to which Prof. E. E. Burtt, a Quaker *and* Buddhist, says "The general philosophical implication is that the mind of the common man is the ultimate court," p. 181 of Man Seeks The Divine, Harper, 1958), and "They who accord with Heaven are preserved; they who rebel against Heaven perish" (Lin Yutang, p. 767). Taoism, the other great Chinese religion, has no concept of deity; it is "a philosophical religion, centered in the deep wisdom of Lao Tse and Chuang Tse." The central concept is "tao" or "The way"; myriad things arise out of the "tao"; they separate themselves by aggression; only as they "return to the Tao" does man "gain light, love, peace, and immortality"; such is the central teaching of this profound little book (E. S. Burtt, pp. 185, 194). Even Hinduism, though it has "duties" lacks A Divine Being (again as Prof. Burtt indicates, p. 209): "First and foremost is the concept of Brhman, the metaphysical absolute. Out of Brhman come all things; to Brhman all things return. In himself Brhman is unknown and unknowable." So the record could be extended almost indefinitely.

It is easy to refer to appellant Mac Murray as an agnostic or as an atheist. History is replete with the

stories of non-conformists who were called atheists because they did not believe according to the current mode. Outstanding, of course, are the early Christians who, pious and moral though they were, were called atheists because they did not believe as did the Greeks or Jews. (Parenthetically we may note that they too were often punished by the Romans for refusing military service.)

> "Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause." (2 Hastings, Encyclopaedia, 179).

Auguste Comte, it will be recalled, is considered to be the founder of modern sociology. Yet Hastings naturally assumes Comte's view to be a "religious conception". Speaking of Comte's followers, the Positivists, Dr. Stanley Coit, founder of the English "Ethical Culture" societies thus treats of their ideal of God:

> "So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which had been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." (International Journal of Ethics, July, 1900, p. 425).

The lack of a positive assertion as to the existence of God is prominent in the religious teachings of the Unitarians and Universalists today. And prominent members of our society from whom we have derived considerable of

our heritage have been among those of similar inclination.

Thus, Jefferson, in writing to his nephew at school, said:

> "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of God; because, if there be one, he must more approve the homage of reason than of blindfolded fear * * * Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you."
>
> J. E. Remsbury, Six Historic Americans, p. 66)

And on another occasion he said:

> "Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it because it is the genius of their religion? No, its genius is the reverse. It is refusing toleration to those of a different opinion. * * *" (A. J. Nock, Jefferson, p. 304).

Congress has placed the stamp of orthodoxy in a field where none exists. The Constitution embodied a toleration for all religions and not for some. Many scholars have defined religion in terms other than a belief in the existence of God, for example:

1. Hoffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.

3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of higher social values.
5. Elwood: Participation in ideal values of the social life.
6. E. A. Ross: The conviction of an idea bond between the members of society.
7. Matthew Arnold: Religion is morality touched with emotion.
8. G. B. Foster: The conviction that the cosmos is idea-achieving.
9. G. W. Knox: Man's highest response to what he considers highest.
10. G. A. Coe: Living the good life.
11. J. R. Seely: Any habitual and permanent admiration.
12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

Indeed, many of the founding fathers would have failed to qualify as "religious" if the present act were applied in relation to them.

The Albany Daily Advertiser in 1831, published a sermon by Reverend Dr. Wilson in which the assertion was made that most of the founders of our country were "infidels" and that of the first seven presidents not one of them had professed his belief in Christianity. (Barnes, History and Social Intelligence, p. 347.)

Dr. Barnes remarked:

> "The late Mr. (Theodore) Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country as a 'dirty little atheist.' By the same criteria most of the Fathers certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists' as they all shared the religious belief of Paine and most other intellectuals of the time, namely, either Unitarianism or Deism." (Ibid.)

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796, an attempt to insert a "Christian" amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "Atheistic proclivities", censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration, assured the Moslems of Tripoli, through his diplomatic representative, that "The government of the United States is not in any sense founded on the Christian religion"—a view later approved by John Adams, who sent the treaty containing this statement to the Senate, and by Jefferson, under whose administration the treaty containing the very quoted words, was ratified (Messages and Papers of the Presidents, pp. 200, 245, 390).

During the campaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time,

and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to confiscate the Holy Scriptures.

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution to be used in determining whether a man is religious or not. Rather, if there be a criterion at all of the quality of being "religious", it must be sought in some other quarter than prevailing customs and inherited belief.

It has been shown, that from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives. Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired conscientious objection—but simply the doctrinal authenticity of his profession of religion?

It is not here maintained that the question of whether a man is religious or not can be simply determined. For-

tunately, this problem is seldom presented to the Courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

Accordingly, the Act by defining out certain admittedly good, moral and ethical beliefs as not "religions" though, it has been shown, they have every earmark which goes to make religion and are world recognized as religions, violates appellant's right to protection under the First Amendment.

The Supreme Being clause in the current draft law places Congress' imprimatur on what religion is.

At least five religious groups are discriminated against by such a standard:

1. The Buddhists in the United States who include 60% of the 185,000 persons of Japanese ancestry, and a considerable portion of the Chinese-Americans. According to Hastings' Encyclopaedia of Religion and Ethics, at p. 183, Buddhism is "radically adverse to the idea of a Supreme Being, of a God, in the Western sense of the word." The Chinese who are Confucian or Taoist are also excluded.

2. Most of the Hindus are affected. The Information Please Almanac for 1954, p. 485, states there are approximately 10,000 Hindus in North America. In Hastings, supra, at p. 184, Hindu literature is quoted to show an important school of that faith denied the existence of God.

3. The Unitarian-Universalists number 151,557. The World Almanac, 1963, p. 706.

4. One group of the Quakers are not members of the National Council of Churches because they do not believe in the Trinity of Divinity.

And before denying a registrant one of the conscientious objector classifications on the assumption that he recognizes no duties "superior to those arising from any human relation" it would have to be established that man is merely human. That has not been established. Congress can create laws but can't create men, man has already been created both human and divine.

Finally, the courts have already stricken down laws of administrative action which attempted to require belief in a Divine Being as a test for religious exemption (*Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127).

As a conclusion to this portion of our argument:

The Supreme Being addition to our 1948 draft law reminds one of the problems the British faced some years ago. Some attention to it may be helpful.

In The Law As Literature, Louis Blum-Cooper, 1961, The Rodley Head, London, the author reports the decision of Lord Sumner, J. A. Hamilton (1859-1934), in *Bowman* v. *Secular Society*. The author relates that it was a case concerning

> "the validity of a bequest to a society whose main object was to propagate anti-Christian doctrines. Sumner, delving deep into the history of the criminal offense of blasphemy, gave the quietus to the supposed

doctrine that Christianity was a part of the law of England. Blasphemy, he said, was, in the absence of scurrility or indecency calculated to shake the fabric of society, not a criminal offense." [295].

As quoted by the author the Judge said:

"When Lilburne was on his trial in 1649, he complained that he was not allowed counsel and appealed to the judges 'to do as they would be done by.' 'You say well', replied Lord Keble. 'The law of God is the law of England.' But all the same, Lilburne had to do the best he could for himself. A passage from Lord Coke may also be quoted. Brooke, J., had once observed casually (Y.B. 12 Hen. 8, fo. 4) that a pagan could not have or maintain any action, and Lord Coke in Calvin's Case, founding himself on this and on St. Paul's Second Epistle to the Corinthians (Ch. 6, V. 15), stated that infidels are perpetui inimici, and 'a perpetual enemy cannot maintain any action or get anything within the realm'. Of this Willes, C.J., in Omichund v. Barker observes: 'Even the devils themselves, whose subjects he (Lord Coke) says the heathens are, cannot have worse principles; and beside the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits.' Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found." [299].

Near the conclusion of his opinion Lord Sumner said:

> "My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'no man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C.J., once said in Bird v. Holbrook (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach; if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part, 'Thou shalt love thy neighbor as thyself' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England." [306-307].

By the above argument we do not say, for we need not, that this is not a "Christian Nation." It is to say that Christianity is not a part of the law of the United States just as it is not part of the law of England. On this point also recall our argument made hereinabove wherein we quoted George Washington, writing to the Tripoli government as President of the United States, that "The government of the United States is not in any sense founded on the Christian religion."

There are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man. In each class individual views vary as widely as individual powers of coherent statement. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. Norman M. Thomas clearly stated it at the beginning of WWI in an article entitled "War's Heretics," which appeared in the August 11, 1917, issue of the Survey:

> "In short, conscientious objectors include Christians, Jews, agnostics and atheists; economic conservatists and radicals; philosophic anarchists and orthodox socialists.
>
> "It is not fair, therefore, to think of the conscientious objector simply as a man who with a somewhat dramatic gesture would save his own soul though liberty perish and his country be laid in ruins. I speak with personal knowledge when I say that such an attitude is rare. Rightly or wrongly, the conscientious objector believes that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."

Millions of Americans would find it impossible to believe, even if this Court should so hold, that our fundamental law secures no place in democracy for persons of such conviction. It lies deep in the moral foundations of every one who has been an American schoolboy that the cardinal excellence of our government is that it assures,

to all men at all times, freedom—which, to mean anything, must mean freedom to believe as individual judgment and conscience may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such freedom both indirectly, by recognizing the retention by the people of their unenumerated natural rights (Amendment IX), and directly, as we have already argued by forbidding Congress to make laws prohibiting the free exercise of religion (Amendment I).

The Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or their duty towards Man.

The twentieth century, however, must and does recognize that religion can surpass and omit all notion of relations with a Maker. For much religion nowadays has done more than escape from churches. It has escaped also from theology. It is still possible for some to state that Jesus hates a pacifist. But many men take responsibility for their beliefs themselves instead of putting it upon a deity.

The thought has been recently expressed by the New York Times editorially:

> "A few weeks ago Augustin Cardinal Bea, one of the Pope's closest advisers, told an American audience that man's right to choose his own religion or even to choose to have no religion is an accepted teaching of the Church. The 81-year-old prelate added that 'both individuals and society should leave each one free to

accept and to fulfill his obligations and duties exclusively by the use of his own free will.' "

"In similar vein the Rev. Hans Kung, dean of the theological faculty at the University of Tubingen in West Germany, has said that ecclesiastical obedience never requires anything to be done contrary to conscience. 'True ecclesiastical obedience', Father Kung asserted, 'unites subject and superior in a common responsibility, serving the true liberty of a Christian man.' "

"If Cardinal Bea and Father Kung are representative of the thinking of the present-day leaders of the Church, as there is every reason to believe, the fresh air is already blowing with gale force in one of the most venerable and most venerated institutions of all mankind." [April 28, 1963].

Interestingly, this appears to have been the view of a high military official who almost 50 years ago, had the opportunity to temper the severity of the then current draft law. The Selective Service Act of 1917 exempted only from combat service those men who were recognized members of the historic peace churches. By order of the Adjutant General, December 19, 1917, exemption was extended to men whose convictions against war were not based on religious affiliation. This order stated in part:

"The Secretary of War directs that until further instructions on the subject are issued 'personal scruples against war' should be considered as constituting 'conscientious objection' and such person should be treated in the same manner as other 'conscientious objectors' under the instructions contained in confidential letter from this office dated October 10, 1917."

The foregoing order did not apply to all conscientious objectors, i. e. those opposed to any and all military service, but it gave cognizance to the great American tradition of freedom of conscience in recognition of "personal scruples against war".

Do beliefs so self-shouldered lose sanctity? Must the conduct which flows from them do without the constitutional protection which would unquestionably attach were they arbitrarily associated with divine revelation?

> " 'He believes in No-God, and he worships him,' said a colleague of mine of a student who was manifesting a fine atheistic ardor; and the most fervent opponents of Christian doctrine have often enough shown a temper which, psychologically considered, is indistinguishable from religious zeal."
> William James, The Varieties of Religious Experience, page 35.

It is the psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.

As we have already commented the framers knew something of fanaticism, intolerance and persecution. They realized that under stress of conviction as to matters of pre-eminent import, even the wisest, most sincere and most humane sometimes lose sight of their own human fallibility and see no wrong in forcing others to walk in paths of which they themselves feel sure. And they intended that under a government founded upon the proposition that men are entitled to life, liberty, and happiness if they can find it, no man's soul should be shamed or

aroused as, for example, a Roman Catholic's would be by statutory compulsion to defile the image of the Virgin. They were dealing for time to come with matter of substance, not with externalities. At a time when Protestant Christianity was practically universal, contemporary utterances as to freedom of conscience were naturally as a rule colored by allusions to the church and the Deity. But these utterances clearly intimate that the substance of freedom of conscience was perceived and intended. Jefferson, for example, in his address to the Danbury Baptist Association (8 Jefferson's Works, 13; quoted in *Reynolds v. U. S.*, 98 U.S. 145 at 164), said this:

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith and worship; that the legislative powers of the government reach actions only, not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their Congress should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."

Chief Justice Waite's interpretation of this utterance is as follows:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted

> almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive good order."

Another statement of Jefferson's (1 Works, 45; also quoted in *Reynolds* v. *U.S.*, at page 163) is still more clear-cut and illuminating. This was in the preamble to the Virginia bill "For establishing religious freedom," which he drew in 1785:

> "To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty."

The view that the framers of the Constitution meant to protect the right to think and believe, regardless of association with church or Deity, is thus supported by contemporary evidence as well as by sensible inference. And since a man's religion is thus in effect synonymous with the beliefs he holds sacred, an exercise of religion occurs whenever he does or refrains from doing anything whatever by reason of belief and under penalty of spiritual self-disgrace.

The religious character of faith or conduct is not affected by its reasonableness or probable or possible rightness. Faith springing from instinct, tradition, or superstition may be as sacred as that which springs from the reasoning processes of well-informed intelligence. For, since everything human is fallible, there is no authorita-

tive criterion of the rightness of anything. The blindest arbitrary assumption has at least the chance of being as right as reason. For reason itself in the last analysis only guesses. It guesses not only at conclusions of conduct, but also at the diagnosis of determining conditions and the appraisal of the relative weight of facts—as for example those bearing upon the precise nature and proximity and relative seriousness of foreign and domestic menaces of oppression or military autocracy.

The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces.

Conscientious refusal to take part in war is equally an exercise of religion. He who believes in democracy and more democracy as the means of carving out for populations as well as for favored individuals the possibility of good lives, and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by war, may believe that he cannot put on a uniform and go out to kill and die without a shame at least as deep as that of his fellow citizen who thinks otherwise and participates in war. And the shame of both is the same kind of shame as that of the Protestant renegade who denied his faith at the doors of the Inquisition.

It is recognized that the right to conform conduct to conscience is subject to the limitation declared in the Mormon cases—that the conduct must not be such as to outrage the moral sense of the community. Works of death in general shock that moral sense.

Can it be that this Act of Congress has not only changed, but completely reversed morality?

CONCLUSION.

There are two opposing views on constitutional supremacy:

Many agree with Elihu Root's 1917 speech, reprinted in the West Publishing Company's Docket for November, 1917:

> "What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. This has to be vested in the military commander in order to carry on war successfully. You cannot have free democracy and successful war at the same moment. The inevitable conclusion is that, if you have to live in the presence of a great, powerful military autocracy as your neighbor, you cannot maintain your democracy."

We urge the court to give the answer to Elihu Root's philosophy which the Supreme Court gave to such reasoning in Civil War times:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."
> Ex parte Milligan, 4 Wall 2.

The time has not come yet for America to declare that freedom is a failure.

Dated: October 4, 1963.

Respectfully,

J. B. Tietz.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz,
Attorney.

No. 18792

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID NEILL MACMURRAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION AND STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 31776-CD on February 6, 1963, charging appellant with violating the Universal Military Training and Service Act, Title 50 Appendix, Section 462, United States Code. On April 8, 1963, appellant was tried by the court. On April 22, 1963, his motions to dismiss the Indictment and for judgment of acquittal were denied, he was found guilty and sentenced to three years in prison. On the same day appellant gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTES INVOLVED.

Title 50 App., Section 462, United States Code provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 50 App., Section 456(j), United States Code provides in part:

> "Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human

relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

* * * * *

Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing."

III.
STATEMENT OF FACTS.

On July 3, 1958, appellant registered at Local Board No. 84, 10935 Camarillo Street, North Hollywood, California. [SS p. 1.][1]

On November 24, 1958, Local Board No. 84 mailed to appellant Selective Service System Form 150 for Conscientious Objectors, and this form was received from appellant by the Board on June 26, 1959. [SS pp. 13, 15.] On his Form 150, appellant claimed exemption from military service in any form, and answered the questions under the title "Series II—Religious Training and Belief."

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[1]SS refers to appellant's Selective Service file, Exhibit 1.

(1) In response to question one's inquiry as to whether he believed in a Supreme Being, appellant checked the box labeled "No."

(2) In response to question two which asked him to describe the nature of his belief which is the basis for his claim of exemption from military service, appellant stated "the make-up of my personality and mind have established definite beliefs and principles against the use of war, or violence in any form; and the principles of the Armed Services for carrying out these ends."

(3) In response to question three which asked defendant to explain how, when, and from whom or from what source he received the training and acquired the belief which is the basis of his claim for exemption, defendant stated "I have received my training in these moral attitudes from my parents, friends, schooling, and environmental influences. These beliefs were acquired at no particular time but are a part of my mental constitution."

(4) In response to question four which asked appellant to give the name and present address of the individual upon whom he relies most for religious guidance, appellant stated "I rely on myself for my religious guidance."

(6) In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a

very creative person being a poet, musician, and writer. I am very sensitive person completely intolerant of violence and destructive measures." [SS pp. 16-17.]

On February 10, 1960, appellant was classified 1-A by Local Board 84, and on February 11, 1960, appellant was mailed notice of said classification. [SS p. 13.]

On March 1, 1960, the Local Board received a request from appellant to extend his appeal period and also for a personal appearance. [SS p. 27.] The Local Board approved appellant's requests and on March 17, 1960, mailed him a letter notifying him that an appointment had been made for his appearance before the Board on May 11, 1960. [SS p. 29.]

On May 11, 1960, the Board received from appellant a letter requesting that his personal appearance be re-scheduled for a later date due to the fact that he had been unable to prepare a statement of reasons to justify a different draft classification, and because he did not have means of transportation to the meeting with the Board. [SS p. 30.]

The Board approved appellant's request for re-scheduling of his appearance and on May 19, 1960, notified him that a new appointment had been made for July 13, 1960. [SS p. 32.]

On July 12, 1960, the Board received from appellant a letter requesting that his appointment be re-scheduled to a still later date. On July 13, 1960, the appellant did not appear as scheduled. [SS pp. 33-35.]

On July 13, 1960, the Local Board notified appellant that it was not in a position to postpone his ap-

pearance to a future time and that no change had been made in his classification. The Board further advised appellant that if he wished to furnish further information to be considered by the Local Board or the Appeal Board he should submit it in writing on or before July 25, 1960. [SS p. 36.]

On July 27, 1960, appellant's file was forwarded to the Appeal Board, and the Board subsequently made the tentative determination that appellant should not be classified in Class 1-O or lower. The Appeal Board then requested a report as to appellant's last address so that he could be notified of the time and place of a hearing before a hearing officer upon his claim that he was a conscientious objector. The Appeal Board was then notified that since appellant indicated that he did not believe in the existence of a Supreme Being the Department of Justice concluded that he was not as a matter of law entitled to be classified as a conscientious objector, and that appellant had not filed a claim within the meaning of the Universal Military Training and Service Act such as confers jurisdiction upon the Department of Justice to conduct an inquiry, hold a hearing, and make a recommendation to the Appeal Board. Thereafter, on March 23, 1961, appellant was classified 1-A by the Appeal Board. [SS pp. 37-39, 41-44.] On March 28, 1961, appellant was notified of his classification. [SS p. 13.]

On November 21, 1961, the Local Board mailed appellant an order to report for physical examination on December 1, 1961. On July 18, 1962, the Local Board

was notified by the Induction Station that appellant had been found fully acceptable for induction into the Armed Forces. [SS pp. 54, 58.]

On July 24, 1962, the Local Board ordered appellant to report for induction on August 20, 1962. Appellant replied by a letter which stated that the Board members "are apparently stupid asses because of their lack of thought processes and their inability to come to a just and obvious decision even with the facts before them." [SS pp. 60, 61-63.]

In the response to appellant's letter the Local Board notified appellant that his file would be brought before the Board for consideration and re-classification. [SS p. 64.]

On August 7, 1962, appellant requested a personal appearance before the Local Board, which request was denied. [SS pp. 66, 69.]

On August 16, 1962, appellant appeared at the Local Board with Leroy Preminger and together they reviewed appellant's Selective Service File. [SS p. 71.] Thereafter, on August 17, 1962, appellant wrote the Local Board stating that he would like to bring new information to the Board's attention. Appellant's letter indicated that he believed in certain things which should be considered a Supreme Being and that his belief should properly be considered as based on religious belief. Appellant asked that his answers to the previously mentioned questions of whether he believed in a Supreme Being and whether they were based on religious

belief be stricken from his file and that his letter be inserted in place of his previous answers. Appellant also requested that the Board re-open his file and take all necessary steps to arrive at a more just and proper classification. [SS pp. 72-75.]

On August 21, 1962, the Local Board was notified by the U.S. Army Induction Station that appellant's acceptability was undetermined pending a Conscientious Objector Waiver. [SS p. 77.] On October 26, 1962, the Local Board received notice from the Induction Station that appellant had been found fully acceptable for induction into the Armed Forces. On October 26, 1962, the Local Board also received notice that a request for Waiver of Civil Offenses had been approved and appellant's induction into the Armed Forces was authorized provided he was otherwise qualified. [SS pp. 81, 93.]

On October 26, 1962, appellant was notified that he should report for induction on November 26, 1962. Appellant was also later notified of the mailing of this letter by telephone. [SS pp. 84, 85.]

On November 26, 1962, appellant reported to the Armed Forces Induction Station, was processed for induction, and was determined fully qualified for induction in all respects. However, appellant refused to be inducted into the Armed Forces, and furnished a signed statement concerning his refusal. [SS pp. 86-87, 88, 89-90.]

IV.
SUMMARY OF ARGUMENT.

A. Appellant Was Not Entitled to an Inquiry and Hearing Upon the Denial of His Claim to Conscientious Objector Status.

B. The Selective Service Act's Criteria for Determining Conscientious Objector Status Are Constitutional.

V.
ARGUMENT.

A. Appellant Was Not Entitled to an Inquiry and Hearing Upon the Denial of His Claim to Conscientious Objector Status.

Title 50 U. S. C. App., Section 456(j) exempts from combatant training and service in the armed forces:

> ". . . any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code.
>
> * * * * *
>
> "Any person claiming exemption from combatant training and service because of *such conscientious objections* shall, if *such claim* is not sustained by the local board, be entitled to an appeal to the appropriate appeal board." [Emphasis added] [Thereafter, inquiry and all hearing with respect to the character and good faith of the objections of the person concerned are required].

The statute plainly states that inquiry and hearing are available to persons claiming exemption because of conscientious objections as statutorily defined. The definition in question indicates that the opposition to war must be "by reason of religious training and belief," meaning "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," but not including "essentially political, sociological, or philosophical views or a merely personal moral code." On his Form 150, appellant indicated that he did not believe in a Supreme Being and that his views were philosophical and personal rather than "religious" as that term is defined by the statute. Under these circumstances, appellant's claim was not the kind covered by the statute, and the provisions for inquiry and hearing are not applicable.

Sincerity of belief is the essence of the inquiry made by the Department of Justice in conscientious objector classification proceedings under Section 456(j), and Congress provided for such inquiries in order to assist in determining the sincerity of claimants' beliefs. *Bouziden v. United States,* 251 F. 2d 728 (10th Cir. 1958); *Selby v. United States,* 250 F. 2d 666 (9th Cir. 1957); *Bradshaw v. United States,* 242 F. 2d 180 (10th Cir. 1957). Since this is so, there would be no purpose in providing a hearing for claimants whose beliefs, even if completely sincere, are excluded by the statute from conscientious objector status as a basis for exemption from military service. Appellant's beliefs, as stated by him, fall within this category, and a hearing in his case would have been pointless. The statute plainly does not give the Department of Justice the authority to hold hearings in such cases, but even

if appellant was deprived of a hearing to which he was entitled, he would not be prejudiced thereby since his own statements would necessitate the denial of his claim to conscientious objector status. *United States v. De Lime,* 223 F. 2d 96 (3rd Cir. 1955).

Not all claims to conscientious objector status, but only those based on statutory grounds, are subject to inquiry and hearing. The leading case on this point is *Clark v. United States,* 236 F. 2d 13 (9th Cir. 1956), in which the defendant based his conscientious objector claim on personal grounds not related to religion or belief in a Supreme Being. Following his classification as 1-A, he appealed and received a hearing. For certain reasons, defendant's file was subsequently closed and re-opened, and he was again classified 1-A. Again he appealed and this time no hearing was held, due to the view of the Department of Justice that it had no jurisdiction to hold a hearing since defendant's claim was not based on any statutory ground of exemption. Defendant was subsequently convicted of refusal to be inducted, and he appealed.

This Court said "[a]ppellant argues that 'all' claims to conscientious objector status require investigation and hearing. We disagree. * * * We note that we are not here dealing with the issue of the sincerity or veracity of appellant's beliefs, but rather with the problem whether any and every claim of conscientious objection requires an investigation and hearing." (p. 21.) After noting that defendant lacked belief in a Supreme Being and did not hold his beliefs "by reason of religious training and belief," this Court said:

> "It is thus obvious that appellant is the type of 'objector' which the statute was designed to ex-

clude (i.e., those holding views based on political, sociological, or philosophical views or a merely personal code). Appellant does not fall within the statutory definition and the denial of his 'claim' is not subject to investigation and hearing by the Department of Justice." (p. 21.)

In view of the language of the statute and this Court's decision in the *Clark* case, appellant in the present case was not entitled to an inquiry and hearing upon the denial of his claim to conscientious objector status.

B. The Selective Service Act's Criteria for Determining Conscientious Objector Status Are Constitutional.

The "Supreme Being" clause does not constitute a "law respecting an establishemnt of religion" or a religious test as a qualification to public office in violation of the constitution.

George v. United States, 196 F. 2d 445 (9th Cir. 1952), *cert. denied* 344 U.S. 843 (1952);

Clark v. United States, 236 F. 2d 13 (9th Cir. 1956), *cert. denied* 352 U.S. 882 (1956), *reh. denied* 352 U.S. 937 (1956);

United States v. Mohammed, 288 F. 2d 236 (7th Cir. 1961).

The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress. *Richter v. United States,* 181 F. 2d 591, 593 (9th Cir. 1950). Consequently, Congress can eliminate the exemption or condition it in any manner, perhaps even unreasonably

and arbitrarily. *George v. United States, supra; Clark v. United States, supra.* However, the present provisions of law defining who may be exempt from military service as a conscientious objector, enacted by Congress in its legislative policy of attempting to avoid unnecessary clashes between the requirements of the law and the dictates of men's conscience, is neither arbitrary nor unreasonable. Although the content of the term "religion" is incapable of compression into a few words, the statutory definition of "religious training and belief" comports with a standard or accepted understanding of the meaning of religion in American Society. *United States v. Kauten,* 133 F. 2d 703 (2nd Cir. 1943); *George v. United States,* 196 F. 2d 445 (9th Cir. 1952); *cert. denied* 344 U.S. 843 (1952). Congress could reasonably have concluded that compelling military service from a person who believes he has a duty toward God not to render such service creates a greater conflict between conscience and the law than is caused by compelling military service from a person who resists it due to duties to himself or other human beings. If Congress could not constitutionally limit the conscientious objector exemption on the basis of certain beliefs, it would be forced to exempt any person who did not choose to enter military service, or to abolish the exemption entirely and compel military service from everyone—even those religiously opposed to it. The Constitution does not require Congress to make such a choice.

VI.

CONCLUSION.

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David R. Nissen

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

DAVID NEIL MAC MURRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 18792

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S CLOSING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

DAVID NEIL Mac MURRAY, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	}	No. 18792

Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANT'S CLOSING BRIEF

POINT I

Special Appellate Procedures

Appellee concludes that Mac Murray was not entitled to an inquiry and hearing upon the denial of his claim to conscientious objection status.

Appellee argues that the opportunities for vindication are available only to registrants within the statutory definition, namely, "by reason of religious training and belief," and that a single word "No" put him at once, and

for all time, outside the law when he answered "No" to the flat question: Do you believe in a Supreme Being?

We argue that the question "Does Mac Murray's evidence place him within the statutory definition" is a question for the administrative appellate determination envisaged by Congress, namely, one where the claim and evidence is sifted and tested by the special appellate procedures.

Appellee's argument assumes that the initial presentation of the registrant's views placed him unmistakably outside the definition. We will (A) demur and then (B) dispute its verity.

A.

Assuming Mac Murray initially placed himself outside the statutory definition does this mean that he is barred from (1) a change of views or (2) a clarification of his presentation? Absolutely not. The regulations themselves are clear on this.

> "§ 1625.1 Classification Not Permanent—(a) No classification is permanent.
>
> "(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupation, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

"(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants."

The purpose of the special appellate procedures for registrants professing conscientious objectors to war was to provide an impartial test of the *bona fides* of the claim, based on a thorough and expert investigation of the claimant. This we argued in our Opening Brief, pages 17-

The law specifies that the special appellate procedures are to help in the determination of "The character and good faith of the objections."

The character of Mac Murray's objections have never been given an administrative appellate determination as provided by Congress; only by the *ipse dixit* of the Attorney General, whose fiat blocked the appellate procedure.

Appellee argues as if the inquiry of the special appellate procedures related only to "sincerity", citing *Bouziden* v. *United States,* 251 F.2d 728 (10th Cir., 1958); *Selby* v. *United States,* 250 F.2d 666 (9th Cir., 1957); *Bradshaw* v. *United States,* 242 F.2d 180 (10th Cir., 1957).

1. *Bouziden.* This case is inapropos for Bouziden was given the special appellate procedures and his argument in the judicial appeal was that the FBI resume furnished him was unfair.

2. *Selby.* The special appellate procedures were given Selby.

3. *Bradshaw.* He too received all the statute provided for him.

Appellee's next step is to argue that Mac Murray was not prejudiced by the deprivation "since his own statements would necessitate the denial of his claim to conscientious objector status. *United States* v. *De Lime,* 223 F.2d 96 (3rd Cir. 1955)."

Except for one item in the file (the X in the NO box on the Supreme Being question) appellee mentions no factual matter to support this conclusion. We will argue this X did not end the matter. First, let us consider the case cited by appellee to compare the factual situation.

De Lime, supra, differs materially from Mac Murray's case on the facts and therefore should not be considered governing authority. The opinion on page 97 shows that De Lime (1) struck out the words "religious training and" in the questionnaire, before the word belief to change the sentence to read "By reason of belief I am opposed . . ." and (2) he crossed out the same words in another place and (3) he explicitly set forth "my belief is philosophical rather than religious," and (4) he made certain it was understood his beliefs were a personal moral code by saying "no person whom I know holds the same or similar beliefs" and (5) he wrote the board a month afterwards that he had no further explanation to make of his views and, when he attended a hearing he (6) reaffirmed that his views were philosophic and not on religious grounds,

although he did claim the wording of the several questionnaires was a literary trap [98].

Nevertheless, De Lime was given a significant part of the special appellate procedures, ones which accorded him a chance to discuss his beliefs with a Hearing Officer of the Department of Justice and to have the benefit of a resume of the FBI reports.

Appellee next argues "Not all claims to conscientious objector status, but only those based on statutory grounds, are subject to inquiry and hearing. The leading case on this point is *Clark* v. *United States,* 236 F.2d 13 (9th Cir., 1956)." The authority of *Clark* on this contention is considerably weaker than appellee's claim for it because of four circumstances:

> *Clark* had been given *all* the special appellate procedures on an earlier appeal: appellant had a full and complete investigation, etc., on his first conscientious objector claim. . . . [20]
>
> Next, the court's statement that Clark did not have a claim *within* the statute *was obiter* because the court had already decided he *had* had the complete special appellate procedures, and the court concluded: [a] registrant is not entitled to repetitious determinations, ..." [21]
>
> Next, Clark was denied the desired classification because he was found to be agnostic in thought. [21]
>
> Finally, and this observation applies also to our next constitutional point, it is obvious that none of the courts that decided Clark, De Lime and George had the benefit of the subsequent Torcaso and Schempp decisions of the Supreme Court. This we

will deal with, at more length, under Point Two, below.

As in the *Bouziden, Selby* and *Bradshaw* cases, *supra,* (all of which turned on other matters, it should be noted), when we read that Clark too had once received the special appellate procedures we must conclude their postures before the courts were unappealing and that there is reason to consider that Clark was not prejudiced. Mac Murray, on the contrary, was obviously prejudiced.

The chief issues to be decided by the special appellate procedures are the truthfulness of Mac Murray and the character and good faith of his claim, not just his sincerity as appellee states. 50 U.S.C. App., § 456, explicitly says it is for determination of "[t]he character and good faith of the objections of the person concerned. . . ." The record squarely presents these issues:

1. Was he truthful on July 1, 1958, when he stated the following:

> "By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a special form for conscientious objector (SSS Form 150) which I am to complete and return to the local board for its consideration."

If it is true that he is a conscientious objector by reason of religious training and belief, as he states above, it follows he should have been so classified. The local board obviously didn't think he was. (Actually, it didn't understand him, then or later.) But there remained the matter

of an administrative appeal. As we argue the one he received was a crippled one, less than the law provided for.

The sole purpose of the special appellate procedures is to aid in the determination of the truthfulness of such protestations.

2. Next, was he truthful on June 21, 1959, when he stated:

> "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces."

We concede that a registrant, after making such a claim can contradict it so clearly that he puts himself outside the definition of the statute. Did Mac Murray do this. Where? Only one item in the file of over 100 pages [Ex. A] is ever alluded to by appellee. This item, the No, was clarified later [Ex. 72-75]. The clarification showed the problem was solely one of semantics. But, even if he hadn't sent in the evidence on pages 72-75 of the Exhibit should this one item outweigh all his other showing? Would the Third Circuit have so decided the De Lime case if he hadn't had six other strikes against him? We doubt it.

B.

Mac Murray's views at all times were within the statutory definition.

First, consider his initial statements:

In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a very creative person being a poet, musician, and writer. I am a very sensitive person completely intolerant of violent and destructive measures." [Ex. 17]

This is a statement of religious belief. It is not a statement of theology.

It is not a statement acceptable to persons who stress humility (cf. *Annett* v. *United States,* 10 Cir., 1953, 205 F.2d 692) nor was its maker acceptable to persons who stress tolerance and good manners (see his statement to the local board, quoted by appellee, re stupid asses) but it is the statement of a recognized and prevalent religious type: a zealot, radical in statement, intolerant, replete with feeling and sentiment.

At age 20 a young man could well balk at the Yes or No check mark indicated for the blunt Supreme Being question. He could easily believe (and what Mac Murray wrote three years later shows this distinction) that an anthropomorphic being was meant. The court's attention is invited to the fact that at certain places in the questionnaries warning signs are posted. For example, in the Classification Questionnaire: Series VII.—CONSCIENTIOUS OBJECTION TO PARTICIPATION IN WAR IN ANY FORM there are two warning statements "DO NOT

SIGN THIS SERIES UNTIL YOU HAVE READ THE FOLLOWING CAREFULLY," at the beginning and "DO NOT SIGN UNLESS YOU CLAIM EXEMPTION AS A CONSCIENTIOUS OBJECTOR" at the end. [Ex. 8].

The question which appellee believes is crucial and determinative: "Do you believe in a Supreme Being" Yes ☐ No ☐ has only a choice of two words. True, the registrant is informed that he may add sheets to the four page questionnaire but there is no warning or the slightest intimation that the authorities will consider that a No to this *one* question ends their consideration of the entire subject and requires a rejection by them without the congressionally provided safeguard being employed.

As we showed in our Opening Brief [34-] the term Supreme Being is synonymous with God. Webster's International:

> "*God.* The Supreme Being; the eternal and infinite spirit; Creator and Sovereign of the universe"
>
> "*Supreme Being.* The eternal and infinite Spirit; God, as the creator and end of man"

We know this is true but Mac Murray didn't in 1959, or even in 1962.

In 1962 he wrote:

. . . . .

> "What I question and resent concerning the Supreme Being clause is the utilization of such an ambiguous word as Supreme Being in this clause with its fundamentalist overtone. I do not believe in any Supreme Being with hair, arms, flesh or in any like-

> ness of man whatsoever. I do believe in a more universal interpretation of Supreme Being as did Albert Einstein, that of a high state of order and even disorder within the physical universe governed by laws which are presently above my ability or that of any man to completely control or completely understand. *If this is a Supreme Being then I believe in the existence of a Supreme Being.*" [Ex. 73]
>
> . . . . .
>
> "My objection to the word Supreme Being is thus based on the lack of a proper interpretation of the word and my failing to have understood the meaning of the word." [Exs. 73-74]

It is a common misconception, especially among young people learning to think for themselves, that the expression Supreme Being means an anthropomorphic being. Note that this was one of De Lime's problems. He stated to the Hearing Officer: "[h]ad I known the full meaning of the wording of the question; I would not have stated that I had no Supreme Being as a basis for my belief and I would not have avoided the word 'religious' had I read it earlier. I had no counsel for advice." [98]

De Lime's claim, as we pointed out suffered from many infirmities for his file shows he had equivocated in many instances and thus contaminated his claim; MacMurray fell into the same semantic trap but his claim does not suffer from the other infirmities that doomed De Lime's, or any others. Mac Murray has been consistent throughout: straightforward, to the point of objectionable righteousness.

Three years after his initial statement [see Exs. 72-75] when he saw a clarification of his religious emotion and sentiment might make his beliefs understandable, he, for the first time explains and shows that to him the Supreme Being question is semantical only.

Although he asked the board to substitute the later statements of belief for the initial one there is no inconsistency between them. The latter is only a clarification of the religious belief clearly expressed in the former although it was not labelled as such by him.

Appellee's argument doesn't point out one sentence or even phrase from Mac Murray's showing as a basis for the conclusory assumption Mac Murray "was clearly outside the statutory definition."

Mac Murray's evidence should be examined to see if two constructions are possible. If so he certainly should have had the benefit of the special appellate procedures to have the truth determined. Of course, if it is clear that he brought himself within the statutory definition (as we have argued) then it is clear he was denied procedural due process.

On the matter of affirmatively expressing belief in a "Supreme Being" he says:

> "A specific and exact definition of Supreme Being, God and even religion are almost impossible because of the great ambiguity of these words and since their meanings vary greatly between many different peoples and cultures, nature, the universe and the laws that govern each of them can all be God and thus, a Supreme Being since they are considered synonymous." [Ex. 72]

Mac Murray then goes on to give a historical analysis showing that, during the course of millennia

> "To the Egyptians and even some people today the sun was a Supreme Being. The moon, rivers, mountains, valleys, forests and stars—all of these have been worshipped as Supreme Being in the past and can be taken for such even today. Anything can be taken as being or symbolically representing a Supreme Being." [72]

In our case we have an expression and clarification of views [Exs. 72-75] presented to the Selective Service System *more than three years* after his earlier presentation [Exs. 16-19, Form 150]. Can it be said that views and expression of views at age 20 are forever binding? True, modification, etc., is subject to some suspicion but sincerity, truthfulness and integrity are what the special appellate procedures are designed to test, that is to compile evidence by FBI investigation, clarify it by a hearing officer hearing, and analyze and summarize it by a department of justice specialist (with two rebuttal opportunities afforded) for the final, informed and advised judgment of an Appeal Board. An appeal without the above on an unaugmented record, is unfair to all concerned and is not what Congress intended when it wrote the law.

It is our view that the expressions of Mac Murray's views [Exs. 72-75] brought him within the statutory definition and within this court's anticipatory decision of *Berman* v. *United States,* 156 F.2d 377, 380 (9th Cir.), cert. denied, 329 U.S. 795 (1946)

> "It is our opinion that the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." [380]

It is our view also, that the Selective System and the Department of Justice should never assume that when a young man is confronted with the Yes or No of the question: Do you believe in a Supreme Being that a No ends the matter. What the registrant really means should be investigated. This, surely was the intent of Congress. This really is the Congressionally assigned function and duty of the Department of Justice.

We believe this is so because the question is not really a Yes or No question.

POINT II

Constitutionality

Appellee's argument that it is permissible for Congress to distinguish the kinds of conscientious objectors on the basis of religion, philosophy, etc., is avowedly based on the principle stated in *George* v. *United States,* 9 Cir., 1952, 196 F.2d 445, namely, that what Congress can do it can do arbitrarily. The fallacy of this is that what Congress is constitutionally forbidden to do it may not do at all. Nor can Congress or appellee rely on the war power clause of the constitution as a side entrance to circum-

vent the First and the Fifth Amendments. *George, supra,* should be revisited.

Appellee argues "The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress. *Richter* v. *United States,* 181 F.2d 591, 593 (9th Cir. 1950)." It does not follow that Congress can therefore grant a privilege, or deny it when the basis is violative of the First Amendment protections and thus we dispute the next statement of appellee: "Consequently, Congress can eliminate the exemption or condition it in any manner, perhaps even unreasonably and arbitrarily. *George* v. *United States, supra; Clark* v. *United States, supra.*"

We contend that the Fifth Amendment bars improper exercise of the war power.

The Supreme Court as early as *Ex parte Milligan,* 4 Wall. 2, 120-121, held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The Milligan case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the State of Indiana, where federal court trial was available. Compare *Cummins* v. *Missouri,* 4 Wall. 277 at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless this Court itself has recognized that such presumption will be of no avail where the presidential war order is clearly shown to be arbitrary and repugnant to the Fed-

eral Constitution. See *Highland* v. *Russell Car & Plow Co.*, 279 U.S. 253, at pages 261 and 262.

Appellee's argument closes by posing this dilemma: "If Congress could not constitutionally limit the conscientious objector exemption on the basis of certain beliefs, it would be forced to exempt any person who did not choose to enter military service, or to abolish the exemption entirely and compel military service from everyone even those religiously opposed to it. The Constitution does not require Congress to make such a choice."

We do not agree with this logic. The First Amendment does not prohibit the exclusion of "certain beliefs" but only the exclusion of all but certain religious beliefs. Some beliefs are religious and some are not. The First Amendment relates only to the former. Next, it doesn't follow at all that "it would be forced to exempt any person who did not choose to enter military service." The next claim "or to abolish the exemption entirely" doesn't follow either. The only statement in point is the last clause "even those religiously opposed to it." Nothing else. The only belief we are concerned with is this latter: "religiously opposed." The other alternatives don't apply at all.

In *Engel* v. *Vitale*, 82 S. Ct. 1261 (1962), Mr. Justice Black, speaking for the court:

> "[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite

as a part of a religious program carried on by government." [1264]

We argue this means the government cannot set up a religious orthodoxy for draft deferment.

Mr. Justice Black also said in *Engle* v. *Vitale,* more to our particular point:

> "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.[15]" [1267]

Since religion is personal it is individual and the proscription of a personal code, by the Act, is therefore a violation of the First Amendment.

The Supreme Court's opinion contains another guide for consideration of our problem:

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [1267]

These principles have been reaffirmed even more recently in *Abington School District* v. *Schempp,* 1963, 374 U.S. 204:

> "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and

concisely stated in the words of the First Amendment." [226]

This principle of absolute protection for religious belief has been affirmed countless times by our courts, often when restating the laws that *acts* contrary to our laws are punishable despite the religious sincerity of the defendant. See a recent example in *U.S.A.* v. *Willard,* D.C. Ohio, 1962, 211 F. Supp. 643, where the court said:

> "Under the First Amendment of our Constitution, freedom to believe in and to adhere to one's chosen form of religion cannot be restricted by law, but freedom to act in accordance with one's religious beliefs necessarily 'remains subject to regulation for the protection of society.' Cantwell v. State of Connecticut, 310 U.S. 296, 303, 304, 60 S. Ct. 900, 903, 84 L. Ed." [654]

Also, see one of the cases cited by appellee: *United States* v. *Mohammed,* 7 Cir., 1961, 288 F.2d 236:

> "Freedom to believe and adopt one's chosen form of religion is an absolute right, but freedom of action in following one's concept of religion is 'subject to regulation for the protection of society.' " [244]

There can be no quarrel with this view of the First Amendment. Here, we are not concerned with an act, but with a belief. Without piling citations upon citations we believe we can ask the court to conclude that the limiting, indeed the proscription of personal religious *belief* in the draft law is contrary to the First Amendment.

It would appear that appellee adheres to a point of view completely at variance with the meaning of the

establishment-of-religion clause which the Supreme Court explicitly set forth in *Everson* v. *Board of Education* 1947, 330 U.S. 1, and to which it had adhered ever since. In Everson and in the subsequent cases of *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) and *Zorach* v. *Clausen,* 1952, 343 U.S. 306, there were two competing views on the meaning of the establishment clause presented to the Court: one held the establishment clause merely prohibited the setting up of a single state church and thus discriminating against all others, while the other held that it prohibited any aid to all churches and religion even on a non-discriminatory basis. Everson laid this issue to rest, and, we trust, permanently, when the latter view was adopted.

Contrary to appellee's contention (p. 12, B), the "Supreme Being" clause does constitute a "law respecting an establishment of religion", in that it defines "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." As pointed out in our Opening Brief, that definition and limitation greatly narrows the meaning of religion so as to exclude from the operation of said law continuing establishments of religion as old as history and constitutes a discrimination against them. It is therefore a "law respecting an establishment of religion," which the First Amendment expressly says Congress shall not make.

Very significantly, as quoted above, Mac Murray contends that the words "Supreme Being" are ambiguous, and follows with a statement that he believes in a Supreme

Being in the sense that Albert Einstein did. It is well known that Einstein professed the beliefs of Spinoza, most reputed as "the God-intoxicated man". It is, indeed, in the light of recent decisions of the Supreme Court, too ambiguous a phrase to qualify under the constitutional prohibition of laws "respecting an establishment of religion."

Appellee says: "The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress." The issues do not require us to disagree. We do not. But the free exercise of religion is a constitutional right, and that means equality before the law of all religions, without legal discrimination in favor of one or many as against the free exercise thereof. Our objection to the definition of "religious training and belief" here in question is that by forbidden legislation it gives special privilege and immunity to those conscientious objectors deriving from religious establishments which have or profess belief in a Supreme Being, as defined in the Draft Act. The law can stand without the definition.

Finally, we argued in our Opening Brief (29, 33) the Supreme Court in *Torcasso* v. *Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 1961, made even more clear that neither State nor Federal Government can constitutionally establish a religious test for any immunity or privilege of a citizen of the United States.

Respectfully,

J. B. Tietz,
Attorney for Appellee.

November 12, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ,
Attorney.

No. 18794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY MARCELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 18794

IN THE

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FOR THE NINTH CIRCUIT

ANTHONY MARCELLA,

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vs.

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Appellee.

BRIEF OF APPELLEE.

I.
JURISDICTION.

This is an appeal from an order, with findings of fact and conclusions of law, of the United States District Court for the Southern District of California, entered April 16, 1963, denying appellant's motion to vacate and set aside his sentence, judgment and indictment which motion had been made under the provisions of Title 28, United States Code, Section 2255.

The jurisdiction of the District Court rested on Title 21, United States Code, Section 174 and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 motion," pursuant to Title 28, United States Code, Sections 1291, 1294.

II.

STATEMENT OF THE CASE.

On April 15, 1959, a six-count indictment was returned by the Grand Jury for the Southern District of California, charging appellant and codefendants Marie Rose Santino and Matthew Santino with various violations of Title 21, United States Code, Section 174. Appellant was charged in five counts. Counts Two and Three charged him with the unlawful receipt, concealment, transportation and facilitation of the concealment and transportation and sale of one pound of heroin on or about November 30, 1958. Counts Three and Four charged him with similar offenses on December 15, 1958. Count Six charged him with a conspiracy with the codefendants and an unindicted co-conspirator, Quentin V. Browning. All violations were alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [T. T. 1-9].[1]

On May 4, 1959, appellant, represented by counsel, Russell E. Parsons and Edward I. Gritz, was arraigned and entered pleas of not guilty before the Honorable Harry C. Westover [T. T. 10].

On August 4, 1959, jury trial commenced before the Honorable William C. Mathes, appellant being represented by his same two counsel [Ex. A].[2] On August

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[1]T. T. is Volume I of the Trial Transcript, pp. 1-118. Volume I of the Transcript of the Trial proceedings was not introduced as an Exhibit in the 2255 proceedings but was a part of the record in this Court during the appellant's direct appeal from his conviction. *Marcella v. United States,* 285 F. 2d 322 [9 Cir. 1960]. Volumes II and III of the Transcript of the Trial proceedings were introduced at the 2255 hearing as Exhibits A and B, respectively.

[2]Exhibit A is Volume II of the Trial Transcript, pp. 1-117.

6, 1959, the jury found appellant guilty on all counts with which he was charged [T. T. 99].

On August 11, 1959, appellant, through his two attorneys, filed a motion for a new trial [T. T. 100-101] which was denied on August 14, 1959 [Ex. C].[3] On the same date appellant was sentenced by Judge Mathes to the custody of the Attorney General for a period of 20 years on each of Counts Two through Five, respectively, and for a period of five years on Count Six. The 20-year sentences imposed on Counts Two and Three were ordered to run concurrently with each other; and the 20-year sentences imposed on Counts Four and Five were also ordered to run concurrently with each other. The 5-year sentence imposed on Count Six was ordered to run concurrently with the 20-year sentence imposed on Count Two. It was finally adjudged that the concurrent 20-year sentences imposed on Counts Two and Three were ordered to run consecutively to the concurrent 20-year sentences imposed on Counts Four and Five. The total time of imprisonment was thus ordered to be 40 years [T. T. 103-5, Ex. C. 9-10].

On August 18, 1959, appellant through his attorneys, Parsons and Gritz, filed a timely notice of appeal from the judgment and commitment of the District Court [T. T. 108-9]. Appellant's counsel, on August 1, 1960, filed an 84-page opening brief in this court raising four questions, one of which was the alleged insufficiency of the indictment [Ex. D].[4] This Court affirmed appellant's conviction in *Marcella v. United States,* 285

[3]Exhibit C is Transcript of August 14, 1959 proceedings, pp. 1-14.

[4]Exhibit D is Appellant's Opening Brief in this Court on the appeal from the judgment of conviction.

F. 2d 322 (9 Cir. 1960). A subsequent petition for rehearing, filed by appellant's same counsel, was denied on February 3, 1961 [Ex. E].[5] Thereupon, appellant's counsel, Russell E. Parsons, filed a petition for Writ of Certiorari in the United States Supreme Court [Ex. H],[6] which petition was denied on May 1, 1961. *Marcella v. United States,* 366 U. S. 911 (1961). Appellant next filed on October 17, 1962 a motion to vacate and set aside the sentence, judgment and indictment pursuant to Title 28, United States Code, Section 2255, alleged grounds for such being:

1. The indictment, conviction and sentence were void because the Grand Jury which returned the indictment had no jurisdiction;

2. The appellee knowingly used perjured testimony of Marie Rose Santino at the trial of appellant; and

3. Appellant was denied the effective assistance of counsel at trial [C. T. 2-4].[7]

On December 3, 1962, appellant and his court-appointed attorney, Marvin Warren, appeared before the Honorable Jesse W. Curtis at a hearing on the 2255 motion [C. T. 69]. In continuing the hearing to December 10, 1962, the Court stated that the only ground it felt it could inquire into was the allegation that there had been perjured testimony at the trial [R. T. 11].[8] Judge Curtis declared that the other matters raised in the 2255 motion had been decided by the Appellate Court

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[5]Exhibit E is Appellant's Petition for Rehearing in this Court.

[6]Exhibit H is Appellant's Petition for Writ of Certiorari filed in the United States Supreme Court.

[7]C. T. refers to Clerk's Transcript of the 2255 proceedings.

[8]R. T. refers to Reporter's Transcript of the 2255 proceedings.

and he saw no reason or basis to re-examine them [R. T. 8].

Appellant and his counsel again appeared before the Court on December 10, 1962 [C. T. 70] where Mr. Warren stated that he had been unable to uncover any basis for perjured testimony in the case [R. T. 16]. Appellant then asked the Court to appoint him another attorney [R. T. 17]. The Court replied that it had read the papers filed by appellant, listened to him and to his attorney, and that the matter would stand submitted [R. T. 19].

On February 8, 1963, appellant, through new counsel, Edward Lascher, filed a motion to re-open the hearing on appellant's 2255 motion [C. T. 71]. Further proceedings were held on February 18, 1963 [C. T. 79] at which time Judge Curtis vacated the order appointing Marvin Warren as appellant's counsel and appointed Mr. Lascher as appellant's new counsel. The Court then stated that it would grant appellant's motion to re-open the hearing to take further testimony [R. T. 22, 25]; and remarked that it had encouraged the re-opening of the hearing because it felt there had not been enough testimony and that the previous hearing was not a complete hearing. Judge Curtis particularly mentioned the fact that the defendant had not had an opportunity to testify [R. T. 24]. Mr. Lascher informed the Court that he believed the only issue at the hearing was a factual question, *i.e.*, whether there was knowing use of perjured testimony on the part of the Government. He conceded that the other two issues raised by the appellant in his original motion had been considered on the appeal from the original judgment, and that he did not believe they were again

open to question under this motion [R. T. 23-24]. In conclusion the Court ordered that a Writ of Habeas Corpus ad Testificandum be issued for appellant's appearance on March 11, 1963, two weeks prior to the date set for the hearing, March 25, 1963, in order to give appellant an opportunity to discuss the case with his counsel and to subpoena any necessary witnesses [R. T. 27].

On March 25, 1963, appellant, through his attorney, sought a continuance of the hearing in order to facilitate subpoenaing those witnesses he felt would be necessary for the hearing [C. T. 80; R. T. 31]. The Court again granted a continuance of the hearing until April 1, 1963 [C. T. 80; R. T. 32].

Mr. Lascher, on behalf of appellant, filed in the District Court on March 29, 1963, a "Petitioner's Hearing Memorandum," which raised nine alleged grounds for granting appellant's 2255 motion [C. T. 81]. The memorandum included those contentions posited by appellant in his original Section 2255 motion, with the exception of the contention of ineffective assistance of counsel.

On April 1, 1963, a complete evidentiary hearing on appellant's 2255 motion was held [C. T. 107]. Six witnesses testified, in addition to appellant, and ten exhibits were admitted into evidence [C. T. 107]. All of the witnesses, whom appellant requested, were subpoenaed by appellee prior to the hearing except one individual whom the Government was unable to serve [R. T. 164]. At the conclusion of the hearing the Court allowed appellant's original 2255 motion to be amended to include all the grounds raised in appellant's "hearing

memorandum" [R. T. 175]. (It is noted that the grounds raised in appellant's "hearing memorandum" included the five issues which are presently before this Court on appeal. More specifically, they are Points 2, 3, 4, 6 and 9 of the "hearing memorandum" [C. T. 81].) The Court ordered the matter to stand submitted, and continued the hearing to April 15, 1963 for a ruling.

The Court denied the 2255 motion on April 15, 1963, stating that he and his law clerk had studied, considered, and discussed the points raised by appellant [C. T. 116; R. T. 191]. The following day Judge Curtis entered a written order denying appellant's 2255 motion. The order recited in part:

> "The Court, being now fully advised, finds that during the trial of the petitioner upon the charges for which he was convicted, the Government did not knowingly use perjured testimony, if indeed the testimony was in fact perjured, and the Court further finds that the remaining grounds asserted in petitioner's motion are not proper grounds for collateral attack upon the judgment of a conviction.
>
> It Is Therefore Ordered that petitioner's motion to vacate and set aside the sentence, judgment and indictment is hereby denied." [C. T. 117-119].

Appellant filed on Airil 19, 1963, a notice of motion for leave to appeal *in forma pauperis,* from the Court's order denying his 2255 motion [C. T. 120-121], and on April 30, 1963, filed a Notice of Appeal from the order [C. T. 127]. On the latter date Judge Curtis entered a written order permitting appellant to appeal *in forma pauperis* [C. T. 128].

III.

STATUTES INVOLVED.

The Indictment was brought under Title 21, United States Code, Section 174, which provides, in pertinent part, as follows:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than 20 years, and in addition may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Appellant's motion, the denial of which is the basis of this appeal, was made pursuant to the provisions of Title 28 U. S. C., Section 2255, which provides, in pertinent part, as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,

may move the court which imposed the sentence to vacate, set aside or correct the sentence.

". . .

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .

". . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a writ of habeas corpus."

IV.

SUMMARY OF ARGUMENT.

The District Court was correct in its finding from the facts developed at the 2255 hearing, that ". . . the Government did not knowingly use perjured testimony, if indeed the testimony was in fact perjured. . . ." The record of the trial and of the 2255 hearings, clearly show that the principal witnesses, whose testimony appellant claims was perjured, told the truth at trial. Appellant has pointed at statements in Mrs. Stantino's testimony at the hearing as contradictory of statements by her at trial and concludes she perjured herself at trial. The record shows that at the hearing Mrs. Santino had difficulty remembering certain events about which she testified at trial three and a half years before. Nevertheless her testimony at the hearing, concerning the important facts material to appellant's conviction, was the same as at

trial. Nor does the record shows material contradiction between Matthew Santino's testimony at trial and his testimony at the hearing. There has been no demonstration of perjury occurring at the original trial in this case.

The hearing record disproves the contention that any law enforcement official, including the Assistant United States Attorney who prosecuted appellant's case, coerced, threatened, or promised any type leniency to the Santinos or anyone else in exchange for any testimony, true or false.

The District Court was correct in denying appellant's 2255 motion because the stated grounds, other than the alleged perjured testimony, were not proper contentions for collateral relief. Appellant now contends that the District Court erred in such ruling as it related to four issues: (1) the failure of his representation by counsel at the preliminary hearings before the United States Commissioner, (2) the failure of his being tried in the Judicial District where the offenses were committed, (3) the insufficiency of the indictment and (4) the punishment imposed was cruel and unusual.

Lack of counsel at proceedings before the Commissioner is not a violation of appellant's right to due process and, therefore, is not a valid basis for collateral relief under Section 2255. This is particularly so in light of the nature of the proceeding at which he appeared without counsel.

The trial record overwhelmingly demonstrates that the Southern District of California was the proper District in which to try appellant for the offenses of which he was convicted. Furthermore, appellant did not raise such question at the trial or appellate level and consequently waived his right to raise such an issue in a 2255 motion. Nor has appellant overcome the statutory presumption in Title 21 United States Code, Section 174, that proof of possession establishes the place of concealment, transportation and sale is as alleged in the indictment.

The sufficiency of the indictment was determined by this Court during appellant's direct appeal from his conviction and the attack on same was found to be without merit. This issue cannot be re-questioned in a collateral attack by a 2255 motion. Additionally, the sufficiency of the indictment is not raisable as a ground for 2255 motion unless it is so fatally defective on its face that it does not reasonably charge an offense and show jurisdiction. The indictment in this case speaks for itself and reveals a properly charged offense.

Appellant's punishment was within the maximum authorized by law and, therefore, is not a proper ground for a 2255 motion. In any event such a punishment is not cruel and unusual punishment.

V.

STATEMENT OF FACTS.

A. Pre-Trial Proceedings.

On March 19, 1959, at approximately 8:00 p.m., appellant was arrested, pursuant to an arrest warrant, at his home in Sherman Oaks, California, by agents of the Federal Bureau of Narcotics [R. T. 53]. At approximately 2:00 a.m. the next morning, appellant's uncle, Anthony B. Pumelia, advised Murray Keslar, an attorney, that appellant had been arrested. At this time Mr. Pumelia asked Mr. Keslar if he would represent appellant and stated that appellant's bail would be set in the morning at about 10:00 a.m. [R. T. 38]. Mr. Keslar told Mr. Pumelia that he could not be present at the United States Commissioner's office at 10:00 a.m. since he had a case in Los Angeles Superior Court at 9:00 a.m., but would go there as soon as possible [R. T. 38].

At approxmately 10:00 a.m., on March 20, 1959, Mr. Keslar, who was then in the Los Angeles Superior Court, spoke by telephone to United States Commissioner Theodore Hocke concerning the bail to be set for appellant at the proceedings then pending before the Commissioner. Commissioner Hocke advised Mr. Keslar that he intended to set bail in the amount of $50,000. Mr. Keslar told the Commissioner that he felt that was "pretty high" and that he would come over to the Commissioner's office. The Commissioner informed Mr. Keslar that "we are just ready to take it up now, to set his bail now." [R. T. 39]. After the phone call, Mr. Keslar proceeded to the Commissioner's office. The bail setting proceeding had already terminated [R. T. 39].

Mr. Keslar testified at the 2255 hearing that at the time of the proceedings before the Commissioner, he had not been hired as attorney for appellant [R. T. 41] and that the only relationship he had to appellant in the matter was the phone call with Commissioner Hocke concerning the bail; several discussions with appellant at the jail [R. T. 41, 43]; and an appearance at the court on the morning appellant was arraigned and pleaded. At the time of entering his plea, appellant advised Mr. Keslar that he had another attorney, and Mr. Keslar thereupon requested that he be relieved as counsel. Mr. Keslar testified that ". . . he never had a deal" with the appellant [R. T. 44]; that he never attempted to have appellant's bail reduced; and that he had no idea whether a preliminary hearing was ever set by the Commissioner [R. T. 41, 43].

Daniel T. Casey and Lawrence Katz, agents of the Federal Bureau of Narcotics, who were present at the proceedings before the United States Commissioner on March 20, 1959, testified at the 2255 hearing that the proceedings consisted solely of the appellant being arraigned, bail being set, and the date for a preliminary hearing being set for a future time [R. T. 61, 166-167].

Appellant also testified at the 2255 hearing that his bond was set at $25,000 during the proceedings before the Commissioner [R. T. 147]. Appellant has mentioned no other occurrence before the Commissioner except his request that the Commissioner wait because "he had an attorney to represent him." Appellant's testimony in no way referred to any statements, pleas, waivers, or preliminary hearing conducted at this time before the Commissioner.

B. Testimony at Trial.

1. Marie Rose Santino.

In the middle of October, 1958, witness Marie Rose Santino spoke by telephone with appellant, who was in Los Angeles, concerning obtaining of narcotics [Ex. A, 9-10]. She and appellant thereafter left Los Angeles by plane on or about October 22, 1958, and flew to San Francisco where she met Mr. Quentin Browning concerning money for the purchase of narcotics [Ex. A, 14, 63]. On the same day, after receiving $7000 from Mr. Browning, she and appellant flew to Chicago to obtain narcotics [Ex. A, 20]. While in Chicago she used the assumed name "Sandino" [Ex. A, 23, 65, 67]. Subsequently, she and appellant returned by plane from Chicago to Los Angeles where appellant gave her a package containing heroin [Ex. A, 31]. She and a girl friend then flew to San Francisco and delivered the package of narcotics to Quentin Browning [Ex. A, 33-35, 76-77].

Three weeks later Mrs. Santino and appellant discussed by telephone the obtaining of more narcotics for Mr. Browning [Ex. A, 37-39]. After this phone conversation, in November, 1958, she and appellant flew from Los Angeles to Chicago to again acquire narcotics. She again used the assumed name of "Sandino" in Chicago [Ex. A, 39-40, 84-85]. After she and appellant returned by plane to Los Angeles, from Chicago, appellant gave her another package of heroin. She and her husband, Matthew Santino, attempted to deliver this package to Mr. Browning in San Francisco but he would not accept it because of supposed inferior quality [Ex. A, 41-42]. That same day, the Santinos returned the undelivered package of heroin to appellant at his store on

Ventura Boulevard in Los Angeles [Ex. A, 45], at which time she overheard a telephone conversation between appellant and Browning concerning Browning coming to Los Angeles to see appellant about the narcotics [Ex. A, 46-48]. Browning and appellant later met at her home in Los Angeles and discussed this second package of heroin [Ex. A, 48-49].

In the middle of December 1958, at her home in Los Angeles, she observed appellant wrapping a package of heroin for shipment to Browning in San Francisco [Ex. A, 50-51].

In February 1959 she was present in appellant's store in Los Angeles and heard a conversation between appellant and Browning concerning the quality of heroin which appellant had obtained for Browning [Ex. A, 52].

Mrs. Santino also testified that had used heroin and other narcotics on previous occasions [Ex. A, 61, 72].

2. Matthew Santino.

On or about November 30, 1958 Santino and his wife, Marie Rose Santino, returned a package of narcotics to appellant in Los Angeles which they previously had taken to San Francisco to deliver to Mr. Browning [Ex. B, 192-195].[9]

In December 1958 he observed the appellant, with the assistance of Mrs. Santino, wrapping a package of heroin in their home in Los Angeles [Ex. B, 195-196].

Prior to the time of their taking the package to Mr. Browning, he had used heroin by sniffing it [Ex. B, 194].

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[9]Exhibit B is Volume III of the Trial Transcript, pp. 118-269.

3. Quentin Browning.

Pursuant to a previous arrangement with appellant Marcella, Browning met appellant at Mrs. Santino's home in Hollywood, California in the latter part of November, 1958 [Ex. B, 120, 135-136].

On October 23, 1958 Mrs. Santino gave him a package of heroin in San Francisco [Ex. B, 127, 131, 169-170]; and in November 1958 Mrs. Santino and her husband delivered another package of heroin to him in San Francisco [Ex. B, 132, 133, 174-176].

During a meeting with appellant in his (Browning's) home in San Francisco, appellant told Browning that he had 15 or 16 ounces of heroin in Los Angeles. Arrangements were then made for appellant to ship that heroin to Browning from Los Angeles [Ex. B, 138-139]. Three days after this meeting, Browning received, via Greyhound, from Los Angeles, a package containing 15 ounces of heroin. The name of the sender on the package was the assumed name which appellant had told Browning he would use [Ex. B, 139-143, 178-179].

Browning met appellant at appellant's store in Los Angeles in February 1959 concerning the sale of narcotics [Ex. B, 146-149, 180-181].

4. Appellant Anthony Marcella.

Appellant admitted at trial that he had taken two roundtrip flights with Mrs. Santino, from Los Angeles to Chicago, in October and November 1958 [Ex. B, 221, 224, 229].

C. Testimony at 2255 Hearing.

1. Marie Rose Santino.

Mrs. Santino testified at the April, 1963 hearing: that she did not remember how long she had known Mr. Browning, but she had known him "a long time" [R. T. 97]; that she never used hard narcotics, including heroin, but had used marihuana [R. T. 100]; that the testimony she gave at the appellant's trial was true [R. T. 102]; and that she had never gone by any other name except her maiden name "Sardo". After her recollection was refreshed by appellant's counsel, she recalled that she had gone by an assumed name in Chicago, "Santez, or some other name "close to Santino. . . . I didn't even remember that, but I do remember it now." [R. T. 107].

Regarding trips to San Francisco, Mrs. Santino testified that she could not really remember how many times she went to San Francisco to sell narcotics to Mr. Browning but thought it was only one time with her husband. Her testimony concerning this subject follows:

> "Q. So it is your best recollection that there was only one sale to Mr. Browning in San Francisco, and only one trip to San Francisco? A. Myself and my husband?
>
> Q. Yes, you never went there with Mr. Marcellla? A. I don't really remember, truthfully.
>
> Q. The one time you did was for the purpose of transporting narcotics, was it not? A. Yes; and we brought it right back . . ." [R. T. 112].
>
> Q. How many times would you say in your lifetime you had made deliveries of narcotics? A. That one time." [R. T. 112].

* * *

"A. We went the one time, my husband and myself; and I don't remember whether I went with him or not. I don't think so. I really don't remember, truthfully." [R. T. 113].

* * *

"A. When I came back from back East, I think that I went from Chicago to San Francisco, and then came down, and then my husband and I both went up" [R. T. 114].

* * *

"A. It has been so long ago. Like I say, I don't really remember." [R. T. 114].

Mrs Santino also testified that she had never been promised leniency by anyone and had never told appellant that leniency had been promised to her [R. T. 101]; or that she had been threatened not to change her story [R. T. 102].

2. Matthew Santino.

Mathew Santino testified at the April 1963, hearing; that prior to testing the package of heroin, which he and his wife had taken to San Francisco for delivery to Browning, he had used narcotics— ". . . had smoked marihuana. I had sniffed heroin prior to this" [R. T. 128]; but had become addicted to heroin only after tasting the heroin in the package they delivered to Browning [R. T. 123]. Mr. Santino also testified that the Government had never promised him leniency [R. T. 119-20].

3. Agent Daniel Casey.

Agent Casey testified that he was present at the time the Santinos testified in court at the trial and their testimony was substantially the same at trial as was what they told him in a pretrial interview [R. T. 60-63].

The Santinos were never promised any consideration for their testimony prior to trial of appellant [R. T. 60].

4. Former Assistant United States Attorney Norman W. Neukom.

Referee in Bankruptcy Neukom was with the United States Attorney's office for about 25 years, except for a period in the Navy, and held the position of Chief Trial Attorney for the United States Attorney's office [R. T. 68]. During this period he tried at least 1200 to 1500 cases for the Government, and handled approximately 200 appeals [R. T. 73, 91].

Referee Newkom traced the history of appellants case in the following manner:

On July 6, 1959 appellant's case was assigned to him to try for the Government [R. T. 69].

> ". . . Mrs. Santino, if I might generalize, testified at the trial virtually in the same words and the same facts as was contained in the statement that I had before me when I had interviewed her" [R. T. 71].
>
> Mr. and Mrs. Santino ". . . testified at the trial almost precisely the same as they had told me upon at least two occasions prior to the trial as to what they could testify to and what they would testify to . . . and if they fabricated at all during the trial they did so under their own conscience, not by any direction or suggestion upon my part. . . . I have never stated to anyone that they lied. In fact I believed what they testified to must have been the truth or I would not have placed either one of them upon the stand." [R. T. 72].

He never stated to anyone that the Santinos had lied on the stand [R. T. 72].

He "most certainly did not" tell Mrs. Santino that she had better stick to her story if she did not want to be sent to prison for a long time [R. T. 76]; or that she would not have to serve a prison sentence if she would testify in favor of the Government [R. T. 71].

He never communicated with Judge Wm. Mathes regarding the sentence to be imposed upon appellant [R. T. 75].

Mrs. Santino never told him that she desired to give testimony different from the story she previously told him or to change her testimony [R. T. 90]; and he never suggested to Mrs. Santino the way she should testify [R. T. 90].

5. Agent Lawrence Katz.

Agent Katz testified that he had discussions with appellant on August 10 and 14, 1959 concerning matters unrelated to appellant's trial. On neither occasion did appellant mention a visit to him by Mrs. Santino, nor did he say anything about Mrs. Santino having told him that she had lied on the stand or that she had been threatened by Mr. Neukom [R. T. 167-170].

VI.
ARGUMENT.

A. The District Court Did Not Err in Its Finding That ". . . the Government Did Not Knowingly Use Perjured Testimony, if Indeed the Testimony Was in Fact Perjured".

A court's judgment on a 2255 motion has presumptive validity, *United States v. Winhoven,* 14 F. R. D. 18 (N.D. Cal. 1953), *app. dism'd* 209 F. 2d 417 (9 Cir. 1953), and a court's findings of fact with respect to evidence admitted at a 2255 hearing, must be clearly erroneous before an appellate court will overrule a judgment and order based on such findings.

Morse v. United States, 324 F. 2d 80 (8 Cir. 1963);

United States v. Di Palermo, 228 F. 2d 901 (2 Cir. 1955), *cert. den.* 351 U. S. 912 (1956);

Johnston v. United States, 292 F. 2d 51 (10 Cir. 1961), *cert. den.* 368 U. S. 906 (1961);

Hearn v. United States, 194 F. 2d 647 (7 Cir 1952), *cert. den.* 343 U. S. 968 (1952).

The movant in a 2255 proceeding has the burden of proving, by a preponderance of the evidence, that his constitutional rights were violated at the trial, and such burden is particularly severe if the judgment of conviction has already been affirmed.

Twining v. United States, 321 F. 2d 432 (5 Cir. 1963) *cert. den.* 376 U. S. 965 (1964);

Miller v. United States, 261 F. 2d 546 (4 Cir. 1958);

Bishop v. United States, 223 F. 2d 582 (D. C. Cir. 1955), *vacated on other grounds* 350 U. S. 961 (1956);

United States v. Robinson, 143 F. Supp. 286 (W.D. Ky. 1956).

An appellate court in reviewing a judgment by the lower court will not second guess the trier of fact who has heard the testimony, scrutinized the witnesses and noted their demeanor and behavior on the witness stand.

Davis v. United States, 327 F. 2d 301 (9 Cir. 1964);

Maldanado v. United States, 325 F. 2d 295 (9 Cir. 1963);

Perez v. United States, 297 F. 2d 648 (9 Cir. 1961).

It is well established law that a judgment and sentence will not be vacated on the ground of perjured testimony unless the moving party shows by a preponderance of the evidence that (1) the testimony was perjured, and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction.

Mooney v. Holohan, 294 U. S. 103, 112 (1935);

Black v. United States, 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938 (1960);

Holt v. United States, 303 F. 2d 791 (8 Cir. 1962);

United States v. Mauriello, 289 F. 2d 725 (2 Cir. 1961);

Smith v. United States, 252 F. 2d 369, 371 (5 Cir. 1958);

United States v. Jakalski, 237 F. 2d 503, 505 (7 Cir. 1956), *cert. den.* 353 U. S. 939 (1957), *reh. den.* 353 U. S. 978 (1957);

Taylor v. United States, 229 F. 2d 826 (8 Cir. 1956), *cert. den.* 351 U. S. 986 (1956);

United States. v. Rutkin, 212 F. 2d 641 (3 Cir. 1954);

Tilghman v. Hunter, 167 F. 2d 661 (10 Cir. 1948).

The movant additionally must prove that the alleged perjured testimony was so material as to contribute to the conviction and of such substance, in relation to the evidence at trial, as to violate movant's right to due process.

Perry v. United States, 297 F. 2d 100 (9 Cir. 1962);

Weaver v. United States, 263 F. 2d 577 (8 Cir. 1959), *cert. den.* 359 U. S. 1014 (1959);

Griffin v. United States, 258 F. 2d 411 (D.C. Cir. 1958), *cert. den.* 357 U. S. 922;

Smith v. United States, supra;

United States v. Gonzalez, 33 F. R. D. 280 (S.D.N.Y. 1960), *aff'd* 321 F. 2d 638 (2 Cir. 1963).

1. The Testimony of Marie Rose Santino at Appellant's Trial Contained No Perjured Statements.

Appellant bases his contention that Marie Rose Santino testified falsely at his trial on what he suggests to be factual inconsistencies between her trial and 2255 hearing testimony. It is here submitted that her statements at trial were in fact the truth, and if inconsisten-

cies there were at the hearing three and one-half years after the trial, they were as to trivial matters and did not relate to testimony which contributed substantially to appellant's conviction.

Appellant has pointed to Mrs. Santino's hearing testimony that she had never used heroin or hard narcotics, whereas she had testified at trial that she had used heroin. It is doubtful whether Mrs. Santino's use of heroin materially affected the jury in its decision that appellant had possessed and sold heroin on two occasions and conspired to sell heroin. Its relevancy at trial probably related to Mrs. Santino's credibility and her admission at the trial of such use may have weakened her credibility as a Government witness — a result favorable to appellant's defense. Consequently Mrs. Santino's denial at the 2255 hearing that she had used hard narcotics reflects no material contradiction with her trial testimony.

Appellant further argues, that at trial Mrs. Santino testified she used an assumed name in Chicago, but flatly denied using such at the Section 2255 hearing. The record shows no such denial. After her recollection was refreshed at the hearing, she admitted using an assumed name in Chicago but could not recall the exact name [R. T. 107].

Appellant further claims that Mrs. Santino perjured herself at trial because she stated she knew Quentin Browning since 1946, and at the Section 2255 proceeding she said she could not remember how long she knew him, but that it was for a long time. These two statements as to Mrs. Santino's acquaintanceship with Mr. Browning are not contradictory. Knowing an indi-

vidual for a period of 17 years, is "a long time". Even if this constituted a conflict, it is so trivial that it suggests no perjury by Mrs. Santino at trial. *Boisin v. United States,* 181 F. Supp. 349 (S.D. N.Y. 1960).

Appellant finally asserts that Mrs. Santino perjured herself at trial because she there testified that she had made three or four trips to San Francisco to deliver narcotics to Mr. Browning; and at the 2255 hearing she testified that she made only one trip to deliver narcotics to San Francisco. Appellant distorts Mrs. Santino's testimony at trial. She never testified that she made three or four trips to San Francisco to deliver narcotics to Mr. Browning. She testified that she could recall having made three trips to San Francisco to see Mr. Browning — two trips to deliver narcotics, and one trip to acquire money with which she and the appellant were to buy narcotics in Chicago.

Appellee submits that Mrs. Santino's testimony, concerning the number of trips to San Francisco to deliver narcotics, is not as precise as appellant indicates in his brief. Mrs. Santino's testimony at the hearing was very indefinite as to whether she took more than the one trip with her husband. She could not remember after three and one-half years. The latter trip, which she definitely recalled, was material evidence in proving Counts Two and Three, and was strongly corroborated by Mr. Quentin Browning who testified at the trial. Consequently, Mrs. Santino's failure to recall at the 2255 hearing an earlier trip does not show that she perjured herself at trial. The more important of the two trips she did recall.

2. The Testimony of Matthew Santino at Appellant's Trial Contained No Perjured Statements.

Appellant contends in general and conclusionary terms that Mr. Santino perjured himself at trial. He fails to substantiate such claim factually — stating it would not add anything to give extensive coverage to the discrepancies and inconsistencies. Appellant's failure to particularize is a proper basis for the Court's not considering such claim related to Mr. Santino's testimony. As noted in *Holt v. United States,* 303 F. 2d 791 (8 Cir. 1962) *cert. den.,* 372 U. S. 970 (1963), perjured testimony need not be considered pursuant to a 2255 motion unless the motion and briefs particularize definitely the perjured testimony alleged to have been knowingly used. See also *United States v. Jenkins,* 281 F. 2d 193 (3 Cir. 1960).

Appellant's argument that the demeanor of the Santinos, in their testimony at the 2255 hearing, suggested that they perjured themselves at trial is a conclusionary statement and the credibility of witnesses at trial is not subject to consideration and review under a 2255 motion.

Dean v. United States, 265 F. 2d 544 (8 Cir. 1959);

United States v. Rosenberg, 200 F. 2d 666, 671 (2 Cir. 1952) *cert den.* 345 U. S. 965 (1953) *reh. den.,* 345 U. S. 1003 (1953).

At page 13 of his brief appellant states that the Santinos and Mr. Browning were richly rewarded by the Government through propositions of leniency in exchange for their testimony against appellant. All of the witnesses at the 2255 hearing categorically denied any suggestion of leniency being made to any witness or suggestion as to how they should testify.

3. Appellee Did Not Knowingly or Intentionally Use Perjured Testimony at Appellant's Trial.

Appellant has suggested that the United States Attorney's office and agents of the Federal Bureau of Narcotics agreed and combined to use perjured testimony at appellant's trial. Messrs. Neukom, Katz and Casey testified that the Santinos' trial testimony constituted materially the same story that was told to them during pre-trial interviews. These three witnesses specifically denied promising leniency, threatening or in any way inducing the Santinos to testify as to anything other than what they truthfully knew. Appellant has in no way attempted to meet his burden of proof by substantiating such unfounded allegations against appellee.

Appellant has also suggested that other Government officials involved in the investigation and development of the case against him were not present at the hearing to testify. The records strongly reflect that appellant and his counsel had sufficient time to subpoena witnesses to appear at the hearing and the Government wholeheartedly cooperated in subpoenaing all witnesses requested by appellant and his counsel.

Appellee submits that the Court's finding of fact that the Government did not knowingly use perjured testimony, if there was such, is not clearly erroneous but is completely in accord with the evidence developed at the hearing. It is further submitted that the allegations contained in appellant's brief were factually and legally insufficient to support the claim that due process had been denied to appellant.

B. Lack of Representation by Counsel at Preliminary Proceedings Before the United States Commissioner Is Not a Proper Ground for a Collateral Attack on the Validity of a Judgment and Sentence Pursuant to Section 2255.

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "(a) Appearance Before the Commissioner.
>
> "An officer making an arrest under a warrant issued upon a complaint . . . shall take the arrested person without unnecessary delay before the nearest available commissioner . . .
>
> "(b) Statement by the Commissioner.
>
> "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Lack of representation by counsel at the proceedings before a United States Commissioner is not an adequate ground to support a Section 2255 Motion.

> *Jones v. United States,* 223 F. Supp. 454 (E.D. Mo. 1964), *app. dism'd* 326 F. 2d 410 (8 Cir. 1964).

There is no constitutional requirement that every accused must be represented by counsel at the preliminary proceedings before the Commissioner.

Burall v. Johnston, 146 F. 2d 230 (9 Cir. 1944), *cert. denied* 325 U. S. 887 (1945);

Price v. Johnston, 144 F. 2d 260 (9 Cir. 1944), *cert. denied* 323 U. S. 789 (1944) *reh. denied* 338 U. S. 819 (1945);

Jones v. United States, supra;

Council v. Clemmer, 177 F. 2d 22 (D.C. Cir. 1949), *cert. denied* 338 U. S. 880 (1949).

The nature of the proceedings to be held before the Commissioner under Rule 5 are not so critical a stage in the judicial process that due process requires an accused to have counsel.

Latham v. Crouse, 320 F. 2d 120 (10 Cir. 1963);

Headen v. United States, 317 F. 2d 145 (D. C. Cir. 1963).

Absence of representation by counsel at proceedings before the Commissioner is not a basis for 2255 relief, unless the movant has proved by a preponderance of the evidence that he was so prejudiced by such lack of counsel that he was deprived of due process.

United States v. Reincke, 333 F. 2d 608, 613 (2 Cir. 1964);

DeToro v. Pepersack, 332 F. 2d 341 (4 Cir. 1964).

The above cited cases concerned habeas corpus proceedings by State prisoners on the grounds that they did not have counsel at the preliminary hearing as required by State law. *DeToro* involved the preliminary hearing

requirements in Maryland and *Reincke* involved the probable cause hearing requirements in Connecticut. The preliminary hearings of both States very closely parallel the proceedings provided for by Rule 5 of the Federal Rules of Criminal Procedure. In Connecticut the probable cause hearing is the same as required by Subsection (c) of Rule 5, except that the accused is required to make a plea. In Maryland no plea is required at the hearing state.

In both cases the defendants' request to have counsel at such hearing were denied. It should be noted that, unlike the instant case, these two cases involved an actual hearing, where presence of counsel might have helped in the examination of witnesses. The attacked proceeding here was not even the "preliminary hearing" contemplated by Rule 5(c), Federal Rules of Criminal Procedure. In both *DeToro* and *Reincke* the courts held that the nature of such hearings were not so critical that the absence of counsel worked "to infect [their] subsequent trial with an absence of 'the fundamental fairness essential to the concept of justice.' "

See also:

United States v. Fay, 231 F. Supp. 387 (S.D. N.Y. 1964).

Appellant has in no way shown, by a preponderance of the evidence, that his lack of representation by counsel at the bail setting proceedings before Commissioner Hocke, pursuant to Rule 5(a) and (b), Federal Rules of Criminal Procedure, infected his subsequent trial with an absence of fundamental fairness essential to the concept of justice. Appellant made no pleas, statements or waivers at that proceeding. In actuality Mr. Keslar,

who admittedly at that time was not counsel for appellant, accomplished as much for appellant by his telephone call to Commissioner Hocke prior to the proceeding as he would have if he had been present. Mr. Keslar suggested to Commissioner Hocke that the proposed $50,000 bail for appellant was pretty high. Thereafter the Commissioner set bail at $25,000 for appellant.

It is submitted that appellant's lack of representation by counsel at the proceedings before Commissioner Hocke was not a violation of due process and, therefore, was not a proper alleged ground for relief under Section 2255.

C. The Sufficiency of the Indictment in the Instant Case Is Not Subject to Collateral Attack Pursuant to the Provisions of Title 28, United States Code, Section 2255.

Issues disposed of on a previous direct appeal from a conviction are not reviewable in a subsequent petition under Section 2255.

Anthony v. United States, 331 F. 2d 687, 693 (9 Cir. 1964);

United States v. Bailey, 331 F. 2d 218 (9 Cir. 1964);

Medrano v. United States, 315 F. 2d 361 (9 Cir. 1963); *cert. den.,* 375 U. S. 854 (1963);

Fiano v. United States, 291 F. 2d 113 (9 Cir. 1959); *cert. den.,* 368 U. S. 943 (1961);

Kyle v. United States, 266 F. 2d 670 (2d Cir. 1955).

The claimed insufficiency of the indictment in this case was raised on direct appeal by the appellant [Ex. D, pp. 77-84], and this Court ruled that such a contention had no merit. *Marcella v. United States,* 285 F. 2d 322 (9 Cir. 1960), *cert. den.,* 366 U. S. 911 (1961).

Assuming *arguendo* that the sufficiency of the indictment was not questioned on direct appeal, such an issue is not a ground for collateral attack pursuant to Section 2255, *supra,* unless the indictment is so fatally defective as to deprive the Court of jurisdiction, and does not under any reasonable construction charge an offense.

Fiano v. United States, supra;

Jackson v. United States, 325 F. 2d 477 (8 Cir. 1963);

United States v. Koptik, 300 F. 2d 19 (7 Cir. 1962), *cert. den.,* 370 U. S. 957 (1962).

Appellant, in his amended motion pursuant to Section 2255 and in his opening brief to this Court, in no way specifies wherein the indictment was insufficient. He merely states general allegations and conclusionary remarks about the "sufficiency", such statements in themselves being insufficient to raise an issue in a Section 2255 motion. *Sanders v. United States,* 373 U. S. 1 (1963); *Trumblay v. United States,* 256 F. 2d 615 (7th Cir. 1958), *cert. den.,* 358 U. S. 947 (1959).

A close review of the indictment in this case reveals that appellant's suggestion as to the indictment's insufficiency has no merit. The indictment sets out clearly and in detail the offenses charged. See: *Robison v. United States,* 329 F. 2d 156 (9 Cir. 1964).

D. Appellant Was Properly Tried in the District Where the Crimes Were Committed, and Such Is Not a Proper Question in the Instant Case, as a Basis for a 2255 Motion.

Proof of jurisdiction must be questioned specifically at trial in order to be reviewable on appeal and if timely objection is not made it is waived as a later ground for a 2255 motion.

McGuire v. United States, 289 F. 2d 405 (9 Cir. 1961);

Markham v. United States, 215 F. 2d 56 (4 Cir. 1954), *cert. den.* 348 U. S. 939 (1955);

United States v. Gallagher, 183 F. 2d 342 (3 Cir. 1949), *cert. den.* 340 U. S. 913 (1951);

Casey v. United States, 20 F. 2d 752 (9 Cir. 1927), *aff'd* 276 U. S. 413 (1928).

Grounds which were apparent when the appellant took an original appeal cannot be made the basis for a second attack on a judgment pursuant to Section 2255.

Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963);

Medrano v. United States, supra;

Fiano v. United States, supra;

Perno v. United States, supra;

Black v. United States, supra.

Appellant in no way at trial, objected that the Government had failed to prove that the Southern District of California was the location of the commission of the alleged offenses. Furthermore, appellant never raised such an issue on his direct appeal. Consequently, this

issue is not a proper basis for a Section 2255 motion. As stated in *Hill v. United States,* 284 F. 2d 754 (9 Cir. 1960), *cert. den.* 365 U. S. 873 (1961), the question of proof of jurisdiction refers to a test of the sufficiency of the evidence and as such must be handled by direct appeal. A Section 2255 motion cannot be substituted for such an appeal. This court said:

> "Upon collateral attack a judgment is presumptively valid unless it appears affirmatively from the record that the trial court was without jurisdiction. . . ."

See also:

Lightfoot v. United States, 327 F. 2d 207 (10 Cir. 1964).

Even if appellant had not waived his right to raise jurisdiction as a ground for his 2255 motion, the District Court's judgment is presumptively valid, and the record on its face shows a further presumption giving jurisdiction to the court. The statutory presumption in Title 21, United States Code, Section 174, provides that, once a defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction. This presumption includes not only the concealment, sale or purchase of the narcotic but also the *place* of such concealment, sale or purchase.

Ware v. United States, 309 F. 2d 457 (8 Cir. 1962);

United States v. Pisano, 193 F. 2d 355, 360 (7 Cir. 1951);

Frazier v. United States, 163 F. 2d 817, 818 (D.C. Cir. 1947), *aff'd* 335 U. S. 497 (1948);

Casey v. United States, supra;

Rosenberg v. United States, 13 F. 2d 369, 370 (9 Cir. 1926).

Appellant has not overcome such presumption which arose from proof of his possession of heroin on or about October 25, 1958, and November 30, 1958, at the Los Angeles Airport and on December 15, 1958, in Mrs. Santino's home in Hollywood, California. In actuality the proof of such possession in said locations factually proved the jurisdiction, without recourse to the presumption.

Appellant has contended that the Southern District of California had no jurisdiction in this matter because the delivery of the narcotic packages was made at San Francisco, California, *i.e.,* in the Northern District of California. Congress has enacted special provisions for jurisdiction of offenses which are begun in one district and completed in another. In Section 3237, Title 18, United States Code, it states in pertinent part:

> "(a) Except as otherwise expressly provided by enactment of Congress, any offesne against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district which such offense was begun, continued, or completed.
>
> "Any offense involving . . . transportation in interstate . . . commerce, is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through or into which such commerce . . . moves."

The offenses covered by Counts Two and Three of the indictment involved a purchase, transportation and sale of heroin by either appellant or by others whom he aided and abetted, in Chicago and/or Los Angeles and/or San Francisco. Under Section 3237, he could have been prosecuted in either of the three districts encompassing those cities. The offenses covered by Counts Four and Five concerned a shipment of narcotics from Los Angeles to San Francisco by Greyhound bus. Pursuant to Section 3237, he could have been prosecuted in either the Northern District or Southern District of California. The conspiracy alleged in Count Six commenced in Los Angeles and in part was executed in Los Angeles. It, therefore, also was prosecutable in the Southern District of California.

Stopelli v. United States, 183 F. 2d 391 (9 Cir. 1950), *cert. den.* 340 U. S. 864, *reh. den.* 340 U. S. 898;

United States v. Malfi, 264 F. 2d 147 (3 Cir. 1959), *cert. den.* 361 U. S. 817 (1959).

Appellant, on page 19 of his brief, refers to a waiver of jurisdiction which he purportedly signed during trial. The record shows no such written waiver [R. T. 10]. The record of trial must be accepted as presumptively accurate and truthful, *Lipscomb v. United States,* 209 F. 2d 831 (8 Cir. 1954). Appellant has not overcome such presumption by a showing of the inaccuracy of such record.

It is submitted that appellant was tried in the District where he committed the offenses and such a question is not a proper basis for a section 2255 motion.

C. **The Sentence in the Instant Case Is Authorized by Law and Not Subject to Collateral Attack Pursuant to the Provisions of Section 2255, on the Grounds of Cruel and Unusual Punishment.**

A sentence, which is within the statutory limits as prescribed by Congress for an offense, is not subject to attack, under Section 2255, on the grounds of severity.

Randall v. United States, 324 F. 2d 727 (10 Cir. 1963);

Perno v. United States, 245 F. 2d 60 (9 Cir. 1957), *cert. den.* 362 U. S. 964 (1960);

United States v. Segelman, 212 F. 2d 88 (3 Cir. 1954).

The sentence imposed upon appellant was authorized by law and not in excess of the maximum prescribed by Congress for a violation of Title 21, United States Code, Section 174. Such section provides that anyone convicted of such violation ". . . shall be imprisoned not less than five or more than twenty years . . ."

If the severity of a sentence were open to collateral attack on the grounds of cruel and unusual punishment, it is submitted that the sentence imposed on appellant was not cruel and unusual punishment. As stated in *Black v. United States,* 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938 (1960), "Ordinarily . . . where the sentence imposed is within the limits prescribed by the statute for the offense committed, it will not be regarded as cruel and unusual." See also *Gallego v. United States,* 276 F. 2d 914 (9th Cir. 1960).

The Indictment, as it pertains to appellant, sets out two distinct violations of Section 174; each violation occurring on a different date under different circumstances and concerning a separate transaction. Counts Two and Three related to a violation on November 30, 1958, and Counts Four and Five related to a violation on December 15, 1958. The wording of the Court's sentence, demonstrated the Court's intention that the two twenty-year sentences, which were ordered to run consecutively, were imposed for *each* of the two separate transactions. The final paragraph of the Court's judgment reads:

> "It is further adjudged that the concurrent 20-year sentences imposed under Counts Two and Three of the indictment and the concurrent 20-year sentences imposed under Counts Four and Five of the indictment shall run consecutively. Total time of imprisonment is forty (40) year." [T. T. p. 105].

In a recent case concerning a similar set of facts, this Court ruled that a Section 2255 motion, which raised the question of cruel and unusual punishment arising out of a sentence of 20 years imprisonment on each of two counts, said 20-year sentences to run consecutively for a total of forty (40) years, was without merit. *Anthony v. United States,* 331 F. 2d 687, 693 (9th Cir. 1964), Appellee submits that the reasoning in the *Anthony* case is applicable to this case and

hould be controlling. The Court there said, in pertinent art:

> "There is no merit to this point. The sentence was within the term prescribed by the Congress. The punishments prescribed, fine and imprisonment are and always have been customary punishments for crime in this country and cannot be said to be either cruel or unusual. The defendant was convicted of two sales on two different days and under different circumstances . . . Appellant was convicted of two separate offenses which occurred on two separate occasions. The punishment fixed for each offense was within the limit prescribed by Congress for that offense, and the Court had the discretion to order the sentences to run consecutively rather than concurrently."

See:

Lindsey v. United States, 332 F. 2d 688 (9th Cir. 1964).

Appellant states on page 20 of his brief that appellee ecommended that the Trial Court "impose the minimum-maximum term of five years". Such was not the ase. Appellee made no recommendation but merely tated "minimum mandatory sentence being required, by aw, Your Honor, I have nothing to say." [Ex. C, 9].

VII.
CONCLUSION.

The records of appellant's trial and 2255 hearing support the District Court's finding that the appellee did not knowingly use perjured testimony at appellant's trial, if indeed there was perjured testimony.

The Trial Court ruled correctly that in the instant case: (1) failure of appellant to be represented by counsel at the proceedings before the United States Commissioner, (2) failure of the appellant to be tried in the District where the alleged offenses were committed, (3) insufficiency of the indictment, and (4) the punishment imposed was cruel and unusual, were not proper grounds for a 2255 motion.

The District Court did not err in denying appellant's 2255 motion on the above grounds.

For the reasons stated, it is submitted that the District's order denying appellant's 2255 motion, should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 18795

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

-oOo-

SIDNEY MARTIN,

Appellant,

v

SAMUEL ROSENBAUM,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

-oOo-

SIDNEY MARTIN,

Appellant,

v

SAMUEL ROSENBAUM,

Appellee.

APPELLANT'S BRIEF

JURISDICTION

This is an appeal by Sidney Martin, individually, and doing business as Jersey Packing Company, a judgment creditor of the bankrupt (hereinafter referred to as Appellant), from an Order of the United States District Court for the Southern District of California, Central Division, dated and entered March 21, 1963.

affirming, on a Petition for Review, an Order of the Referee below permanently restraining Appellant from proceeding in an action captioned "SIDNEY MARTIN, ETC., Plaintiff, vs. SAMUEL E. ROSENBAUM, et al., Defendants, Docket No. 719 567, in the Superior Court of the State of California for the County of Los Angeles," and from in any manner enforcing or attempting to enforce any judgment which may have been entered therein.

This Court has jurisdiction of this appeal pursuant to 28 USC § 1291 and 11 USC § 47 (Bankruptcy Act of 1938, § 24).

STATEMENT OF THE PLEADINGS

These proceedings were initiated on November 8, 1961, when the bankrupt, SAMUEL ROSENBAUM (hereinafter referred to as Respondent) obtained an order requiring Appellant to show cause why Appellant should not be restrained from requiring the bankrupt to appear in supplementary proceedings then pending in the Superior Court, or from otherwise enforcing his judgment. [TR. 27][1] Appellant had previously obtained a judgment in the said Superior Court action and at the hearing on November 14, 1961,

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[1] TR 27 refers to transcript of record, Page 27. The symbol TR will hereinafter be used to designate the transcript of record.

the Referee below ruled that the judgment debt was dischargeable and that Appellant would be restrained. Appellant forthwith filed a Notice of Petition for Rehearing [TR. 33-37] with Points and Authorities. (Urging for the first time three additional grounds for denial of relief to Respondent, first, having allowed his default to be entered, Respondent had confirmed the truth of the allegations of the Complaint and that the judgment was conclusive on the character of the obligation and could not be re-examined; second, that Respondent to obtain relief must first have shown the Court that he had no adequate and speedy remedy in the State Court, and this he failed to do, and, third, that the Bankruptcy Court only could restrain a creditor where there was a showing that the bankrupt had no such adequate remedy in the State Court, and that at best, therefore, the Respondent should have been entitled to a stay, and not a permanent restraint, until such time as the Respondent moved to discharge Appellant's judgment pursuant to § 675(b) of the California Civil Code of Procedure.)

In response to said Petition for Rehearing [TR. 48-50], Respondent admitted that a default had been entered in the State Court action No. 719 567. [Paragraph 2, TR 48], and in a second separate defense pointed out, inter alia, that Appellant, because of filing a creditor's claim was bound

by the Bankruptcy Court's decision.

A hearing was held on the Petition for Rehearing on November 28, 1961. The Referee again ruled that the judgment debt was a dischargeable one. The Respondent's counsel submitted Findings of Fact and Conclusions of Law, objections were made thereto, and the Referee thereafter prepared his own Findings of Fact and Conclusions of Law [TR. 58-64], and ultimately made and entered an Order on March 12, 1962.

On March 20, 1962, Appellant filed a Petition for Review of the Referee's Order [TR. 65-71]. The Referee, on March 30, 1962, filed his Certificate on Petition for Review of the Referee's Order of March 12, 1962, [TR. 72-77], asserting that there were but two issues, first, whether the Court could receive extrinsic evidence, and, second, whether it had abused its discretion in not reopening the case for further evidence. After an extension, Points and Authorities were filed on behalf of the Appellant [TR. 79-80] and a detailed Memorandum was filed on April 24, 1962. [TR. 81-96] Respondent filed a Memorandum in Opposition thereto [TR. 97-104] on April 30, 1962, and the Petition for Review was set for hearing on September 10, 1962. [TR. 105]

The Petition was argued on September 10, 1962, but it was not until March 21, 1963, that Judge Hall entered

an Order affirming the Referee [TR. 106].

Appellant, on April 1, 1963, filed a motion for re-hearing on April 15, 1963. [TR. 107-111]. Said Motion was denied and this Appeal taken.

STATEMENT OF THE CASE

A. INTRODUCTION

Judge Hall, in his Order below, indicated that the Appellant had not seen fit to obtain a transcript to the testimony and stated that the only credible thing in that respect was the recital of facts contained in the Certificate of the Referee and the Findings of Fact. Judge Hall was not altogether correct. He should have added that the facts admitted in the Petitions and Responses filed by the parties obviously would be evidence. So would the documentary evidence. Moreover, there is a partial transcript of the Referee's statements which has been added to this record to indicate the difference between what the Referee said, and what he ultimately prepared in his Findings of Fact.

Basically, the Referee's Certificate sufficiently states the facts for the purpose of review and appeal so that a full transcript, other than the partial transcript,

was in the opinion of the Appellant's counsel, unnecessary. Most of the so-called testimony concerned the bankrupt's version of the facts alleged in the Complaint which, in Appellant's view, (otherwise set forth in this Brief), were immaterial since the principal point in this Brief is that the Referee's right to review the State Court record is a limited one, and that he cannot go beyond a Complaint and a Default which admits the facts and retry the facts and reach a different conclusion then that reached in the State Court.

The Court should also bear in mind that the testimony of the Respondent was taken subject to a motion to strike because, in line with the foregoing, Appellant contended that the Respondent was estopped to go beyond the Complaint, Default and Judgment entered thereon. [Partial Transcript, p. 2]

B. THE EVIDENCE PRESENTED

The Referee's transcript indicated that the evidence was presented by means of the pleadings, documentary evidence and testimony of the bankrupt. At the initial hearing on November 14, 1961, it was shown that on March 25, 1959, Appellant, a citizen of the State of New Jersey, had filed a Complaint in the Los Angeles Superior Court

[Exhibit "A" in evidence] seeking a Judgment on three common counts for $3,991.93 and, in the alternative, on a fourth count, for $3,990.50, charging that the Respondent had, upon false pretenses and fraudulent representations, purchased goods and credits when he knowingly and intentionally did not intend to pay for said goods. [Pages 3 and 4 of Exhibit "A"].

Respondent had been duly served with a copy of the said Summons and Complaint, and after failing to answer or otherwise plead, his default was entered. Appellant, following the Superior Court rule, then had submitted an Affidavit of Proof [Exhibit "B" in evidence] and a Judgment was entered in Department 63 by Commissioner Nichols. In support of this, the Appellant then asked the Court to refer to the Proof of Claim that had been filed in the Bankruptcy Court.

Appellant's counsel then indicated that the payments were thereafter made by bankrupt until bankrupt filed a voluntary petition in bankruptcy on January 24, 1961. [TR. 2, etc.]

It should be noted that Schedule "A"-3 [TR. 6] listed Appellant as a Judgment Creditor. The Appellant then asked the Court to refer to the Petition in Bankruptcy. Appellant had filed a Proof of Claim in this matter on June 21, 1961 [TR. 22] asserting that he held an unsecured

claim, which had been reduced to a Judgment for $3,990.50, plus interest and costs. The Proof of Claim recited as to the Judgment that there was a "certified copy annexed hereto and made a part hereof."

It must and should be noted that, at this initial hearing, the Referee made no comment or statement that the certified copy of the Judgment was not annexed to the said Proof of Claim.

(It was only at the re-hearing that the Referee stated that the Proof of Claim did not have a certified copy of the State Court Judgment.) [Referee's transcript of evidence, 7:9-25.] If the certified copy of the Judgment was not present, the only reference made to it was a nebulous suggestion to Appellant's counsel to "complete the record". [Referee's transcript of evidence, 8:15-23] It was only at the second hearing that Appellant's counsel informed the Referee that it was the first time that the Referee had indicated that a certified copy was not attached to the claim and the Appellant's counsel stated to the Referee that it was his understanding that when the Referee referred to completing the record, that what the Referee desired was the testimony of Mr. Rosenbaum, [the transcript of evidence, 9:24-26].

It must and should also be noted that the fourth count of the Complaint, the fraud count, was for $3,990.50, the

same amount referred to in the Proof of Claim, and a clear indication that the Judgment referred to in the Proof of Claim had reference to the fraud count, and not to the common counts. Moreover, the Referee should have known, or certainly should have taken judicial knowledge of the procedure in the State Court which required a proving up of a Judgment before a Referee only in a fraud count, and not for the common counts.

In summary, at the initial hearing on November 14, 1963, the Referee below considered only the Petition in Bankruptcy, Proof of Claim and the documentary evidence.

At the second hearing, in response to what he thought was the desire of the Referee to complete the record, Appellant's counsel, over objection, examined the Respondent as to the background of the Judgment, and the claim upon which it was based. The testimony of Respondent is set out in the Referee's Certificate. [TR. 75-76] In brief, the Respondent simply contradicted what he and his counsel believed to be the material allegations in the Affidavit of Proof. Respondent was well aware that the Appellant, then being in New Jersey, would not personally take the stand in rebuttal.

Despite the categorical denials, Respondent confirmed in his testimony that he had done business with the Appellant, that he was doing business with the discount

store in New Jersey known as "Two Guys from Harrison" and that once he started doing business with "Two Guys" (whether he conceded he was a concessionaire or not, the volume of his purchases doubled) [TR. 75] and that the Appellant's risk of doing business with Respondent was directly related to his relationship with "Two Guys". In his testimony, Respondent further mentioned that his payments from "Two Guys" were weekly. Although he denied the conversations set forth in Paragraph 4 of the Affidavit of Proof that his relationship with "Two Guys" was an opportunity of a lifetime, it is significant that the amount of $4,000.00 he allegedly collected just before he left New Jersey, was the approximate amount which was delivered to him from July 1st until July 12, 1958 (the payment of which would have accounted for the $4,000.00 referred to by the bankrupt). Apart from whether the Referee below should have taken evidence extrinsic to the record, the most that can be said of the Respondent's testimony is that he fairly related the situation, but where the facts would entail testimony of the Appellant and other witnesses, he simply denied such conversations.

C. FINDINGS OF FACT

After the rehearing on November 28th, the Referee

again indicated that he would hold in favor of the Respondent, and directed that findings of fact and conclusions of law be prepared. A draft of the proposed Findings of Fact was submitted, objections were made thereto, and finally, on March 12, 1962, the Referee prepared and filed his own Findings of Fact.

Generally, the Findings of Fact followed and confirmed the pleadings in bankruptcy, and were based on the Respondent's testimony. The Referee made little, if any, reference, however, to the documentary evidence and to the stipulated pleadings, and it is these points which Appellant challenges as erroneous for generally, there is no dispute as to the basic factual background of this case which is set forth in the Findings of Fact. In light of the emphasis apparently placed by the Referee and also the District Court Judge on the failure of the Appellant to attach a certified copy of the Judgment, we can only point out that the Referee found [Findings of Fact II] that the bankrupt had listed Appellant as a Judgment Creditor, that the Appellant had filed the Proof of Claim reciting that he was, in fact, a Judgment Creditor [Findings of Fact III], that the Estate had been closed on October 26, 1961. [Findings of Fact IV], that the Appellant had commenced proceedings to enforce his Judgment [Findings of Fact IV-1/2], and that the Appellant had

urged that his Judgment was a non-dischargeable one under § 17(a)2 of the Bankruptcy Act [Findings of Fact VI]. As we shall note, under the legal argument, our principal objection to the Findings of Fact are not what they state, but what they failed to state and, further, that the Referee made Findings on facts which should not have been considered by the Court.

Although we urged before the Referee and continue to urge that the Referee should not have taken extrinsic evidence, an example of the failure of the Findings of Fact to state the evidence can be found in the Referee's Certificate on Review with the Findings IX and X. The comparison will show that the Referee, although there was oral and documentary evidence, failed to indicate that the Respondent had more than doubled his business by reason of doing business with "Two Guys from Harrison", that the business relationship between Appellant and Respondent had changed, that the average amount of business after Respondent started doing business with "Two Guys" had more than doubled, that Respondent was or was not a concessionaire, that there is no finding one way or the other that the Respondent represented to Appellant that his position was improving, and that his relationship with "Two Guys" was or was not extremely satisfactory and was or was not his opportunity of a lifetime.

Additionally, the Findings of Fact are incomplete and, therefore, erroneous in that there are no findings on evidence presented to the effect that Appellant had filed an action in the Superior Court, No. LASC 719, 567, upon a Complaint alleging false pretenses, that the Respondent was duly served, that he defaulted, and that a Judgment was entered, and most importantly, that bankrupt took any steps or sought any remedy in the State Court prior to seeking relief before the Referee below.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

The points on which appellant intends to rely on appeal are:

1. In ascertaining whether a Judgment has been discharged in bankruptcy, may a Bankruptcy Court go behind the Judgment and receive extrinsic evidence for the purpose of determining the character of the debt upon which the Judgment is based.

2. To what extent can a Bankruptcy Court examine the record in the State Court and hear evidence extrinsic thereto where the State Court Judgment was entered by default and where the material allegations of the Complaint in the State Court sufficiently pleaded an intent to

defraud, and that the Bankrupt knowingly or fraudulently made materially false statements.

3. Is the Creditor's Judgment founded upon a liability which is non-dischargeable under the provisions of § 17(a)2 of the United States Bankrupt Act.

4. To what extent must the Bankrupt prove that he has no adequate or speedy remedy in the State Court in order to call upon the exercise of the jurisdiction of the Bankruptcy Court to restrain a creditor.

5. Will the supplementary proceedings enjoined by the Referee so interfere with the possession or custody of any property of the Bankrupt, or unduly impede or embarrass the Court in the administration of the Bankrupt's estate, or after acquired property, so that a permanent restraint is unnecessary.

6. Do adequate remedies, if any, exist in the State Court so that a permanent restraint is unnecessary.

7. Under what special circumstances should a Referee exercise his discretion in entering a permanent restraint against the creditor.

8. Must a Referee find special circumstances in order to exercise his discretion before entering either a temporary or permanent restraint against a creditor.

9. Was there an abuse of discretion on the part of the Referee in entering a permanent restraint against the creditor.

10. Did the Referee enter Findings of Fact and/or Conclusions of Law that were erroneous.

11. Did the Bankruptcy Court have jurisdiction over the person of this creditor to summarily proceed where the Referee apparently questioned the validity of the claim and found that no part of said Judgment, certified or otherwise, was attached to the said claim.

12. Did the Referee abuse his discretion in refusing to reopen the case, for further evidence.

13. Were the Findings of Fact incomplete and, therefore, erroneous in that there are no Findings on the evidence presented to the effect that petitioner had filed an action in the Superior Court, No. LA 719 567, upon a Complaint alleging false pretenses, that Bankrupt was duly served, that he defaulted, and that proof of such fraud was submitted by Affidavit to the Commissioner, who, thereupon, entered Judgment based upon said fraudulent allegations.

14. Were the Findings of Fact incomplete and also erroneous in that there was no finding that the bankrupt took any steps or sought any remedy in the State Court prior to seeking relief in the Bankruptcy Court.

15. Was Paragraph I of the Conclusions of Law incomplete and, therefore, erroneous in that there was no conclusion that the equity jurisdiction of the Court

could be exercised only in unusual circumstances and where a specific embarrassment arose.

16. Was Paragraph III of the Conclusions of Law incomplete and, therefore, erroneous for the reason that while the Court may go behind a Judgment under certain conditions, where the Judgment is based upon proper allegations of fraud and false pretenses following a default, the Findings of the State Court are conclusive upon those issues tendered and the Bankruptcy Court has no authority to go behind that Judgment.

17. Were Paragraphs V and VI of the Conclusions of Law incomplete and erroneous in that the power of the Bankruptcy Court to enjoin the State Court action is a limited one and is to be exercised only after the Bankrupt is shown that he does not have an adequate remedy in the State Court and where there is no adequate remedy, that the power is to be exercised only until there is such remedy and that there is a remedy in the State Court following a discharge not only by injunction, but also by Code provision which permits a Bankrupt to expunge a Judgment from the record by filing a petition indicating that the Judgment is a dischargeable one and that he, in fact, has been discharged in bankruptcy.

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SUMMARY OF ARGUMENT

In summary, it will be Appellant's position that although the Bankruptcy Court below is clothed with equity jurisdiction to determine whether a claim founded upon a Judgment should be within or excluded from the effect of a discharge, such jurisdiction has been held to be exercised only in unusual circumstances and where specific embarrassment arises, and that it is the duty of the party seeking such injunctive relief to first show the Court that such circumstances and embarrassment exist, and that here the bankrupt failed to show such circumstances.

Assuming that the Referee below properly exercised his jurisdiction, the second and most decisive point on appeal is that the Referee erred in taking and hearing evidence extrinsic to the Judgment by default which the Appellant had obtained in the Los Angeles Superior Court because a Judgment by default, similar to a Judgment by stipulation, admits the material allegations of the Complaint and is conclusive as to the issues tendered by the Complaint. While, in ascertaining whether a Judgment has been discharged in bankruptcy, broad language has stated that a Bankruptcy Court may go behind the Judgment to examine the entire record, and where the record before the

Bankruptcy Court is not complete or in doubt receive extrinsic evidence for the purpose of determining the character of the debt upon which the Judgment is based, this rule is limited by two conditions on its face: First, that the record before the Bankruptcy Court be incomplete, and second, that the record before the Bankruptcy Court be in doubt. Here the Referee's transcript shows that he considered the allegations of the Complaint (which had been admitted by the default) sufficient in themselves to constitute fraud, and a judgment thereon, a non-dischargeable one. But having done this, the Court completely ignored the established decisions as to the effect of the issues tendered by the Complaint and came to a different conclusion by doubts which he stated were raised by the Affidavit of Proof filed in the State Court. This is not the type of doubt which permits a Court to determine the character of the debt. The Referee then sought to justify his action by finding incompleteness in the absence of a certified copy of the Judgment which Appellant assumed to be annexed to the Proof of Claim.

Here, again, the transcript of evidence shows that Appellant had offered the Proof of Claim with what Appellant believed to be a certified copy of the Judgment annexed thereto as part of the Appellant's case. It was not until after the re-hearing that the Referee specifically

suggested by his statements that the record was not complete due to the absence of a certified copy of the Judgment annexed to the Proof of Claim.

As we shall hereafter show, the code and general orders do not require a certified copy of a Judgment to be annexed to a Complaint, and that the reference to a Judgment is sufficient proof that a Judgment existed. Apart from the Proof of Claim, the very Petition of the bankrupt was to restrain a Judgment, the response of the bankrupt to the Petition for a re-hearing admitted a default following the filing of the Complaint, and the Findings of Fact referred to a Judgment. Apart from the fact that the Proof of Claim recited the original Judgment being for the sum of $3,990.50 which was the same as the fourth count in the Complaint submitted to the Referee, if the Referee, to satisfy such doubts as may have existed, wanted to review a copy of the Judgment, the fair and proper procedure would be to suggest to Appellant's counsel that, for one reason or another, the certified copy of the Judgment which Appellant believed to be annexed to the Proof of Claim was absent. The transcript of evidence shows that the Appellant's counsel immediately sought to add a certified copy to the record when he learned of the absence of the certified copy of the Judgment, but the Referee refused to do so.

Apart from the cases which would indicate that, in this instance, a certified copy of the Judgment would be superfluous, if it was important, the Referee abused his discretion in refusing to reopen the case for the purpose of obtaining such a certified copy of the Judgment.

The third point in this Brief is that Appellant's judgment is a non-dischargeable one. Apart from the common counts, the fourth of the counts of the Complaint was one seeking damages for false and fraudulent representations which induced Appellant to sell goods on credit to the Respondent and for which he did not intend to pay. The Referee below conceded that the Complaint did allege fraud in terms that were non-dischargeable and when those allegations were admitted by the default of the defendant, it follows that certain Findings of Fact, not for what they said, but what they failed to say, were clearly erroneous.

Lastly, assuming that the Referee below was not estopped and could independently review the facts adversely to the Appellant, the proper course of procedure was for the Referee to grant only a temporary stay, until the Respondent could take advantage of the State Court remedies available to him to test the dischargeability or non-dischargeability of the defendant's Judgment.

ARGUMENT

I

THE REFEREE BELOW ERRED IN ENJOINING ENFORCEMENT OF APPELLANT'S JUDGMENT SINCE HE DID NOT FIRST FIND THAT THERE WERE UNUSUAL CIRCUMSTANCES OR SPECIFIC EMBARRASSMENT TO CALL UPON THE JURISDICTION OF A BANKRUPTCY COURT.

(a) A Bankruptcy Court has primary jurisdiction to determine the dischargeability of a debt. While the earlier cases question the authority of the Bankruptcy Court to determine the effect of a dischargeability of a judgment on after acquired assets, the Supreme Court in, Local Loan Company v Hunt, 292 U.S. 234, 54 S. Ct. 695, 78 Law. Ed. 1230, dispelled all doubts about the jurisdiction of the Bankruptcy Court to consider the question and it has been held that the Bankruptcy Court has both a primary and superior jurisdiction to determine the effect of its own decree of discharge, as the Referee has determined.

Holmes v Rowe, 97 F. 2d 537, 540 (C.C.A. 9, 1958)

However, jurisdiction aside, the proper inquiry in every case is whether that jurisdiction should be exercised. As was said in Local Loan Company, at 54 S. Ct. 698:

> "(The Court) probably would not and should not have done so except under unusual circumstances

Conclusion

I

[illegible]

such as here exist."

Thus, the Supreme Court properly pointed out that inquiry is not based alone on jurisdiction, but whether that jurisdiction should be exercised. In the Local Loan Company v Hunt case, only $300.00 was involved and the basis of dischargeability was a lien based upon an assignment of wages which was held to be insufficient and the Court's finding that the remedy in the State Court was entirely inadequate because it was wholly disproportionate to the trouble, embarrassment and possible loss of employment which was involved. It was thus the finding of this special embarrassment which supported the cases of Personal Industrial Loan Corp. v Forgay, 240 F. 2d 18, C.C.A. 10, 1957, and Seaboard Small Loan Corp. v Ottinger, 50 F. 2d 856, 859 (C.C.A. 4, 1931) which the Referee cited under the Conclusion of Law V. The essence of these cases, however, was a specific finding that the remedies in the State Court under the circumstances were entirely inadequate.

(b) There was no evidence nor finding that special circumstances existed for the exercise of the Court's jurisdiction. In his conclusions of law, [TR. 62-63] and specifically, conclusion of law No. IV, the Referee below found that he had the equitable jurisdiction to determine whether Appellant's claim was dischargeable, that the Court

had primary and superior jurisdiction, and that exhaustion by the bankrupt of his State remedies was not a prerequisite to the exercise of the Court's injunctive power. With these conclusions, we have no argument. But what we do complain of is that there were no Findings of Fact and in no Conclusions of Law that the Respondent bankrupt did anything in the Court below to call upon the exercise of the Bankruptcy Court's jurisdiction. The only thing that the Respondent did was to allege in his Petition which supported the original Order to Show Cause to restrain Appellant [TR. 24], that he would be compelled to pursue along an expensive course of litigation in the State Court. At the hearing on November 14th, the Referee simply reviewed this Petition, the Response thereto, and ordered the Appellant to proceed with his case, assuming without argument, without evidence, without review of the procedures available in the State Court, that it had to exercise its jurisdiction.

In summary, we have reviewed every case cited by the Referee in his Conclusions of Law, and in none of them is the jurisdiction of the court exercised absolutely. Rather, the power of the court depends upon unusual circumstances and special embarrassment. Accordingly, in California State Board of Equalization v Coast Radio Products, 228 F. 2d 520 (C.C.A. 9, 1955), although it

was clear that the court had jurisdiction, it was held that such jurisdiction was permissive and should be exercised only in the sound discretion of the court and as a result the lower courts were reversed in seeking to force the Board of Equalization to file its otherwise non-dischargeable claim in the Bankruptcy Court and share in the assets of the Bankruptcy Court.

Apart from the other points, we submit that on this ground alone, the Referee below committed reversable error.

II

UNDER CALIFORNIA LAW, A JUDGMENT BY DEFAULT ENTERED IN THE STATE COURT IS CONCLUSIVE AS TO THE TRUTH OF THE FACTS ALLEGED IN THE COMPLAINT AND ALL FACTS NECESSARILY INCIDENT THERETO AND, THUS, THE REFEREE BELOW COMMITTED REVERSIBLE ERROR IN RE-TRYING THE ISSUES TENDERED BY THE COMPLAINT IN REACHING A CONTRARY CONCLUSION.

(a) A Judgment by Default admits the material allegations of the Complaint.

§ 462 of the Code of Civil Procedure provides that every material allegation of a complaint not controverted by the answer must for the purpose of the action be taken as true.

Crespi & Co. v Giffen, 132 CA 526, 530 (1933)

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

C.C.P. § 463.

Likewise, it has been held by the California courts for countless years that by permitting his default to be entered, a litigant confesses the truth of all the material allegations in the complaint.

Fitzgerald v Herzer, 78 Cal App 2d 127, 131 (1947).

In that case a judgment had been entered in a personal

injury action in which the acts of the bankrupt defendant were charged in the original complaint to have been grossly careless, reckless, negligent and wanton. The defendant received a discharge there on April 12, 1945, and thereafter the plaintiff brought an action on the judgment seeking a new judgment for the amount thereof with interest. The discharge was noted by the court and a judgment in favor of the defendant was entered. On appeal this was reversed. The court cited § 17 of the Bankruptcy Act and stated, at Page 130:

> "Whether a judgment is cancelled by a discharge in bankruptcy depends on the nature and character of the liability for which it was recovered. Therefore, in ascertaining whether the judgment upon which the instant action is based was discharged, the court will go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and when necessary extrinsic evidence will be received for the purpose of determining the character of the debt. *(cases cited)"

At page 131 the court continued:

> "The acts of defendant were charged in the original complaint to have been grossly careless, reckless, negligent and wanton. To avoid a discharge in bankruptcy it was not necessary that the words 'willful and malicious' be used. The terminology in the

> complaint is the equivalent of 'willful and malicious' as used in the Bankruptcy Act."

Continuing further on the effect of the default judgment, the court stated, at page 130:

> "Since the judgment in the former action had become final, the court erred, not in rejecting plaintiff's offer of proof, for such proof was unessential, but in rendering judgment in favor of defendant on the evidence before the court, consisting of the complaint in the original action, the default of defendant and the judgment for plaintiff. The evidence tendered by the offer of proof would have established nothing more than defendant had admitted by his failure to answer in the first action. By permitting his default to be entered he confessed the truth of all the material allegations in the complaint (Wilshire Mortgage Corp. v O.A. Graybeal, 41 Cal. App. 1, 5 *; Strong v Shatto, 201 Cal. 555, 558 *; Brown v Brown, 170 Cal. 1, 5*) including the allegations of wantoness, recklessness and gross carelessness. (Van Epps v Aufdenkamp, supra 138 Cal. App. 622, 623 *)."

The gist of this ruling is found in the words following that quotation as follows:

> "A judgment by default is as conclusive as to the issues tendered by the complaint as

> if it had been rendered after answer filed and trial had on allegations denied by the answer. (Maddux v County Bank, 129 Cal. 665, 667; Morenhut v Higuera, 32 Cal. 289, 295) Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint. (Horton v Horton, 18 Cal. 2d 579, 585; Harvey v Griffiths, 133 Cal. App. 17, 22). Since the only defense presented in the instance action was the discharge in bankruptcy, futile insofar as plaintiff's claim is concerned, judgment should have been rendered in favor of plaintiff on the evidence introduced." (Emphasis added)

In Van Epps v Aufdenkamp, 138 Cal. App. 622, 646, the Court stated as to the default of a bankrupt in a State Court action in the following language:

> "The respondent in the case now before us did not see fit to interpose a defense to the action, thereby admitting that while in possession of the certificates of stock, he unlawfully converted and disposed of the stock to his own use, to the damage of the plaintiff in the sum of $1,700.00. In line with Smith v Ladrie, supra, we are of the opinion that such conversion was willful, because it was voluntary, and malicious

> because it was intentional, and that the judgment based upon such injury is not released by the discharge in bankruptcy."

While a default judgment, as stated in the case of Maddux v County Bank, 129 Cal. 665, 667, (1900) is not conclusive as to all matters, it is conclusive as to the truth of the facts alleged in the Complaint and all facts necessarily incident to such facts and to the enforcement of the claim therein set forth. For our purposes, the character of the obligation is based upon the facts as they existed at the time the Complaint was filed, and the facts at the inception of the debt alleged in the Complaint. It is conceded that the dischargeability of the debt upon the grounds of false representations must show that the false representations existed at the inception of the debt. Here, we submit the allegations of the Complaint (Exhibit "A" in evidence) clearly indicate fraud from the inception of the debt and a misrepresentation in the intention of the purchase of goods. See 2 Collier, 1630, § 17.16. The Bankruptcy Court's right to take extrinsic evidence is limited.

Our grievance with the Referee is not in the general law which he sets forth in Conclusions of Law I, II and III, but in his application of those rules.

It has long been held that the dischargeability of a

judgment is determined by the nature of the underlying claim. Boynton v Ball, 121 US 457, 7 S. Court 981, 30 Law Ed. 985. Where the claim is one for conversion, such as in Van Epps v Aufdenkamp, supra, or in Wilson v Walters, 19 Cal 2d 111, (1941), and a Judgment is obtained, there has been no problem. The Court simply looks beyond the Judgment, notes that the claim is one which is non-dischargeable, and excepts the Judgment from the discharge. Where the Judgment is based upon a note or claim, that Judgment would normally be dischargeable unless it could be shown that the note or claim was actually based upon false and fraudulent representations. Whether a Court can redetermine the dischargeability of the Judgment, in ascertaining whether in fact the note or claim was founded upon fraud, has divided the Courts. Fidelity and Casualty Company v Golombosky, 133 Conn. 317, 50 Atl. 2d 817 (1946) cited under Conclusions of Law I by the Referee, supports the minority position. In such cases, the Bankruptcy Court or the State Court has gone beyond the Complaint and ascertained the basis of the claim. California had adopted this minority position as set forth in US Credit Bureau v Manning, 147 Cal. App 2d 558 (1957) and Yarus v Yarus, 178 Cal App 2d 190 (1960), both cited by the Referee under Conclusions of Law III [TR 62]. For a complete discussion of this problem, see the annotation in

170 ALR 361. In re Tamburo, 82 Fed. Supp. 995, (DC Maryland, M.D., (1946)) cited by the Referee in Conclusion of Law IV, is one of those cases that stands for the proposition that the character of the debt is to be determined from the record of the proceedings in the Court which entered the Judgment.

Thus, if this was the case where the Judgment had been entered simply on the common counts or upon a Promissory Note without any reference to fraud, California following the minority rule, we could not object to the Referee's taking of extrinsic evidence to determine the nature of the underlying obligation.

However, in the instant case, where the Complaint alleges fraud, and sufficiently alleges fraud in the inception as the Referee himself conceded when at Page 6, lines 16 and 17 of the transcript of evidence, he stated:

> "While the Complaint in this case I think would be sufficient of itself."

and by reason of the default there is a stipulation admitting the material facts of that Complaint, the Judgment is one in fraud, is non-dischargeable and, thus, no extrinsic evidence can be taken.

In summary, the proper inquiry in any case is not the taking of extrinsic evidence, but whether the material allegations of the Complaint in the event of a stipulation or default

or proof during a trial, will or will not support the creditor's claims concerning the non-dischargeability of his Judgment.

If the material allegations, or the evidence, which are well-pleaded, or which are presented, support the creditor's position, there is no need for extrinsic evidence. If the material allegations do not support the creditor's claims that the Judgment is a non-dischargeable one, then under the Manning and Yarus cases, the creditor is given the opportunity of producing such extrinsic evidence. Conclusion of Law III cited by the Referee, upon which the Referee based his authority to retry the facts of this case, incorporates a condition precedent "when necessary". It must follow, therefore, that the Referee cannot in every case take extrinsic evidence because, otherwise, a condition precedent "when necessary" would be superflous. This Court should bear in mind that the general rule of a pre-Bankruptcy Judgment is that the validity and amount of it are res judicata. Pepper v Litton, 308 US 295, 60 S. Ct. 238, 84 Law Ed. 281 (1939). The history of the conclusiveness of Judgments in Bankruptcy, is traced in 3 Collier on Bankruptcy 1833, ¶ 63.11. Briefly, under the Act of 1867, because of full faith in credit, it was held that a Judgment of a State Court could not be impeached when presented as a claim in

Bankruptcy. Campbell's case, Fed Case 2, 349 (DC, PA). However, under present law, such a Judgment is held to be subject to collateral attack for lack of jurisdiction, Matter of Nelson, 36 Fed 2d 939 (DC Idaho) or for extrinsic fraud or collusion. But it has been held that a Judgment rendered by default conclusively establishes the creditor's claim and can be eliminated only by opening the default in the State Court. Matter of Smith, 36 Fed 2d 697, (CCA 2d).

As stated in Hendler v Walker, 200 Fed 566, (CCA Mo. 1912), the Court said:

> "The controlling question is whether the Judgment of the State Court concludes the controversy and bans the further prosecution of the claim in the Court of Bankruptcy. We think it does." * The Judgment was upon the merits." "The rule as to the conclusiveness of an adjudication when the same matter again comes up between the same parties is too familiar to require much restatement. It covers questions of both law and fact upon which their rights depend and those which might have been determined, as well as those which were."

(b) The Creditor's Judgment, being in fraud, is a non-dischargeable one.

Where a complaint seeks damages for false and fraudulent representations, and a judgment is entered in accordance

with the allegations of the complaint, that judgment even though a remedy for contract also existed, is not dischargeable by bankruptcy.

Wilson v Walters, 19 Cal. 2d 111, (1941);

In the Wilson case, plaintiff, a judgment creditor, sought a garnishment upon the salary of a public officer. Two grounds were raised. One, that public salaries were immune from garnishment, which ground was overruled. Second, that the judgment had been discharged by defendant's discharge in bankruptcy. This defense was also overruled, but the trial court was reversed with an order directing the disbursement of the funds to the judgment creditor.

As to the discharge in bankruptcy the Court there pointed out that the record showed a complaint in several counts, one being for money had and received, and one for damages for false and fraudulent representations made with the intent to deceive and upon which the plaintiff had acted and had been induced to advance money. The Court stated that it was apparent that all of the counts involved the same transaction and same money, and stated that the pleading of the actual fraud was complete and sufficient.

The defendant there had filed an answer denying the allegations of fraud, but after it was filed he stipulated that a judgment might be taken against him "in accordance with the allegations of the complaint herein".

The court cited the usual rules that it was immaterial whether or not plaintiff proved her claim in the bankruptcy proceedings, or that a judgment had been obtained, stating at Page 121:

> "The sole test of whether or not a liability is discharged in bankruptcy is not whether the claim is susceptible of proof in the bankruptcy proceedings under the bankruptcy laws. If a claim is not provable then for that reason alone, it is not discharged by bankruptcy. But in addition thereto a claim or liability which falls within the class expressly excepted by the bankruptcy act "from the discharge, is not discharged even though it is a provable claim."
>
> * * * * * *
>
> "It cannot be said that plaintiff waived the tort, the claim based upon fraudulent representations, and relied upon contract in her action and is thereby foreclosed from asserting that her claim is based on fraud and not discharged in bankruptcy. The designation of her complaint at the beginning thereof as being for damages and breach of contract is of no significance. She stated counts both in contract and fraud, the stipulation for judgment and the judgment recited that the latter was in accordance with the allegations of the complaint. Therefore, it cannot be said that the Judgment is not

predicated on fraud, or that the liability on that basis was abandoned."

See also Crespi & Co. v Giffen, Supra, at Page 530.

(c) It was not necessary to annex a certified copy of the Judgment.

The Referee below indicated that the failure of the Appellant to annex a certified copy of the Judgment to his Proof of Claim filed in Bankruptcy was a decisive fact in creating "doubt" concerning the dischargeability of the Judgment. In fact, the refusal of the Referee to permit Appellant to file such a certified copy, was considered by the Referee to be one of the two principal issues in his Certificate of Review. [TR 74]

The fallacy of the Referee lies both in fact and in law.

(i) FACT

As a matter of fact, there is no question that Appellant had a Judgment by Default. For example:

(1) Appellant was listed as a creditor holding a Judgment in the bankrupt's Schedule "A-3" [TR 6];

(2) The very Petition which initiated this restraint alleged in Paragraph III thereof that Appellant was a Judgment Creditor [TR 23];

(3) The Proof of Claim filed by Appellant alleged that he was a Judgment Creditor. [TR 22];

(4) The Response of Respondent to a Petition for Rehearing before the Referee specifically admitted that a default was entered in the Superior Court action [TR 48];

(5) Finding of Fact IV-1/2 finds that Appellant commenced proceedings in "said Superior Court action for the purpose of attempting to enforce the Judgment entered therein". [TR 59];

(6) Finding of Fact VI makes reference to a Judgment [TR 60].

Is there any question that Appellant had a Judgment?

(ii) LAW

As to the law, the requirements for filing a Proof of Claim in Bankruptcy are set forth in § 57 of The Bankruptcy Act, 11 USC § 93 and General Order 21. Generally, a Proof of Claim consists of a statement under oath in writing signed by the creditor setting forth the claim, the consideration therefor, any securities held, payments made thereon, and that the claim is justly due and owing.

Certain claims, if founded on a written instrument,

are supposed to have the written instrument attached. 11 USC 93(b). General Order 21, however, in setting forth the written instruments to be attached, specifically does not include a Judgment, or a certified copy of a Judgment.

More importantly, as amended in 1960, 11 USC § 93 (a), provides that a Proof of Claim filed in accordance with the Bankruptcy Act, the General Orders and the official forms, even if unverified, shall constitute prima facie evidence of the validity and amount of the claim. Examination of Appellant's Proof of Claim [TR 22] shows full compliance with the Bankruptcy Act, the General Orders and the use of the official form, except perhaps in actually annexing a certified copy of the Judgment.

While not necessarily binding upon the Referee, no objections were made to Appellant's Proof of Claim during the pendency of the Estate. Moreover, after an Estate is closed, 2 Remington on Bankruptcy (Rev.) 498, § 1041, states that once an Estate is closed, the allowance or disallowance of a claim should not be considered or reconsidered. Further as to Judgments, 2 Remington 153, § 730, provides:

> "When a claim is based on a Judgment, a certified copy or transcript of the Judgment probably should be attached to the Proof of Claim to clarify the statement

of it, though it is doubtful whether a Judgment is within the intendment of the 'written instrument vision of the statute' (emphasis added)"

"Cox v Farley, 2 Ohio DEC. Reprints, 291, 2 West LM 315: "A record is undoubtedly the evidence of an indebtedness; but is it a 'written instrument?'* Now, from the use of the words 'written instument' it is clear that the code refers to an instrument executed by or between parties. Webster defines the word, as a writing containing the terms of the contract. In this sense, a record is not a written instrument. The Judgment of the Court is the ground of the action and the record is mere evidence of that recovery. The record is as accessible to the one party as to the other. It is public property and either party can obtain a copy of it." (Emphasis added.)

2 Remington 152, § 30 further states as to written instruments:

"Failure to file the instrument does not invalidate the claim, or raise any presumption against existence of a pertinent writing, the statute, and the direction on the official form to attach notes or negotiable instruments to the proof, being considered directory rather than mandatory". (Emphasis added)

See In Re Petrich, 43 Fed 2d 435 (DC Cal. 1930).

(d) If the Referee below considered the certified copy of the Judgment to be important, then the Referee should have permitted the claim to be amended upon the first request therefor.

The duty of a Referee to reconsider and amend Orders is governed under Federal Rules of Civil Procedure, § 60. Proofs of Claim are said to be amendable, not by reason of any provision of the Bankruptcy Act or General Orders, but because of the liberality in allowing amendments under Rules of Civil Procedure, § 15.

2 Remington, 176, § 746. Although the permission of a particular amendment lies in the Referee's discretion, it has long been the practice to permit amendments curing mistakes of either fact or law in the absence of fraud, provided injury to others will not result.

2 Remington 178, § 752, in cases cited in the footnote.

Thus, an amendment would be allowed to correct a technical defect in an affidavit which constitutes a formal proof of claim.

Re Supreme Appliance & Heating Co., 100 Fed 2d 200 (DC. Ky, 1951)

Recently it was held that since the Bankruptcy Court is a Court of Equity, the trend is toward greater liberality

in the allowance of admendments or amending of Proofs of Claim where there is anything in the record to justify such a cause of action.

Federal & Deposit Co. v Fitzgerald, 272 Fed 2d 121 (CCA 10,Colorado, 1959), Cert. Den., 362 US 919, 80 Sup. Ct. 669, 4 Law Ed. 2d 738.

Where the claim was based on a written instrument which was not submitted with the Proof of Claim it may be added by amendment even after the time to file a Proof of Claim has expired.

Globe Indem. Co. v Keeble, 20 Fed 2d 84 (1927 CCA 4)

In fact, a claim has been permitted to be filed wherein it appeared that the attorney who was supposed to file the Proof of Claim inadvertently forgot to file the entire Proof of Claim.

In re Oscillation Therapy Products, Inc., 94 Fed Supp 779 (DC New York 1951).

It irresistably follows that there is no foundation, either in law or fact, for the Referee's emphasis upon the lack of a certified copy of the Judgment, and his failure to permit a certified copy of the Judgment to be filed.

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III

CERTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE CLEARLY ERRONEOUS, SHOULD BE SET ASIDE, AND CONSTITUTE REVERSIBLE ERROR.

Under Federal Rule of Civil Procedure 52, a finding of fact will be set aside if it is clearly erroneous as, for example, in not being supported by the evidence.

Campana Corp. v Harrison, 114 Fed. 2d 400 (C.C.A. 7, 1940)

In reviewing the conclusions of law, however, appellate courts have greater latitude and need not respect those conclusions that do not rest properly on the facts so found.

Bullen v De Bretteville, 239 Fed. 2d 824 (C.C.A. 9, 1956).

Under California law, the tests of which we believe are applicable here, findings must be made upon every material issue supported by substantial evidence.

Edgar v Hitch, 46 Cal. 2d 309 (1956).

Likewise, where affirmative matters are raised, findings must be made upon them.

See Bertone v City and County of San Francisco, 111 Cal. App. 2d 579 (1952).

Although findings can be implied, an omitted finding on a material issue is said to be fatal to the judgment.

See Zeller v Browne, 143 Cal. App. 2d 191 (1956).

The findings of fact which have been objected to are discussed at length above. Again, the principal vice of the Referee below is not in the particular findings that he did make, in general, but in his failure to make findings upon material matters which were submitted to him and his interpretation of the evidence which was presented to him.

We submit that where there are no findings on material issues, such failure is clearly erroneous, and where the omitted findings are pertinent to the decision of the Court, the fact of omission constitutes reversible error.

There is no presumption of correctness, however, as to a question or conclusion of law.

In re Newcomb Interests, Inc., 171 Fed. Sup. 704 (ND Cal. 1959) Affirmed Sub. Nom. Huffman v Farros, 275 Fed. 2d 350 (C.C.A. 9, 1960) (The issue there was the validity of a lease re-transfer agreement under California Law)

Whether the default judgment, under the doctrine of Fitzgerald v Herzer, Supra, is res judicata of the issue of fraud is, we submit, a question of law.

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IV

ADEQUATE REMEDIES EXISTED IN THE STATE COURT TO DETERMINE THE DISCHARGEABILITY OF A DEBT AND, AT BEST, A PERMANENT RESTRAINT WAS UNNECESSARY.

The Referee's Order [TR 63-64] permanently restrained Appellant from proceeding in the State Court action. Even if the Court properly exercised its jurisdiction and probably could take extrinsic evidence and redetermine the material allegations of the Complaint, we submit that the Court should not have permanently restrained the Appellant. The action that initiated these proceedings was an application for supplementary proceedings in the State Court. As to such supplementary proceedings, a motion could have been made in the State Court testing the dischargeability of the Judgment and, secondly, after one year under the provisions of Civil Code of Procedure, § 675 (b), the Respondent could seek to expunge the Judgment from the records upon the ground that it had been discharged in bankruptcy.

Normally, the Court in which a debt is proceeded upon is the proper forum to determine whether a discharge releases that particular debt.

Matter of Andrews, 47 Fed. 2d 949 (DC Cal. 1931). In the Andrews case, a creditor sought to bar the discharge of

the bankrupt, upon the ground that the only debt scheduled by the bankrupt was a non-dischargeable one. Although the bankrupt's discharge was granted, the Court stated that the proper forum for determining whether the debt was dischargeable or non-dischargeable was the State Court.

It has been further stated that an injunction should only be granted until the bankrupt can move in the State Court for a discharge, or the equivalent of a discharge.

Matter of Stoller, 25 Fed. Sup. 226. Thus, where there is a proper remedy, the matter should have been left to the State Court since the jurisdiction of the Bankruptcy Court while primary, is exceedingly narrow.

Ciaverelli v Salituri, 153 Fed. 2d 343 (1946).

In the latter case, the stay was vacated.

While it appears that the bankrupt may not have tested the dischargeability of the debt under § 675(b) for a year after his discharge in bankruptcy, the application for supplementary proceedings, we submit, was not such an overt act which would embarrass the bankrupt or cause him any great expense, and all other issues aside, the order of the Bankruptcy Court should have been

the State Court to initially allege that the underlying debt sounded in fraud. Rules of law are not always to be generalized; however, the error of the Referee below was in applying a Rule of Law to a factual situation not designed for that Rule of Law.

Under all the circumstances, therefore, we urge that the Findings of Fact and Conclusions of Law are clearly erroneous, and that, not only should the Referee and the District Court be reversed, but that this Appellate Court should rule that Appellant's Judgment was, in fact, a non-dischargeable one.

Respectfully submitted,

ROBERT G. LEFF

Attorney for Appellant.

C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion, the foregoing brief is in full compliance with those Rules.

Robert G. Leff

NO. 18795

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIDNEY MARTIN,

Plaintiff and Appellant,

vs.

SAMUEL ROSENBAUM,

Defendant and Respondent.

RESPONDENT'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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Los Angeles 48, California

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

As is apparent from the Referee's Findings of Fact, respondent Samuel Rosenbaum was for many years conducting a retail meat business in New Jersey, purchasing his meat supplies from the appellant Sidney Martin, on an open book account. The amount owing to appellant varied between $1,400.00 and $5,500.00. Respondent came to California and on January 24, 1961, filed a Voluntary Petition in Bankruptcy, listing appellant as an unsecured creditor on a judgment for $4,057.00 plus interest. Appellant filed his unsecured creditor's claim, alleging that the consideration for the debt was meat products sold and delivered upon fraudulent representations. The claim alleged that a judgment was entered in

the Los Angeles Superior Court and that a certified copy of said judgment was attached to the claim. However, no certified copy of said judgment was ever attached to the claim or introduced into evidence. No objection to the discharge of the bankrupt was filed and the Final Discharge in Bankruptcy for respondent was entered on October 26, 1961. After the entry of the Final Discharge the appellant commenced proceedings in the Los Angeles Superior Court for the purpose of attempting to enforce the judgment theretofore entered by default against the respondent herein. Respondent sought and obtained a permanent injunction from the United States District Court referee restraining appellant from enforcing or taking any other action on the Los Angeles Superior Court Judgment on the ground that the Superior Court Judgment was not based on fraud and therefore was discharged by the debtor's discharge in bankruptcy. The referee's action was upheld on review by the District Court Judge. The issue before this Court is the propriety of the above ruling.

SUMMARY OF ARGUMENT

In his opening brief, appellant states: "In his Conclusions of Law (Tr. 62-63) and specifically, Conclusion of Law No. IV, the Referee below found that he had the equitable jurisdiction to determine whether appellant's claim was dischargeable, that the Court had the primary and superior jurisdiction, and that exhaustion by the bankrupt of his state remedies was not a prerequisite to the

exercise of the Court's injunctive power. With these Conclusions, we have no argument." Thus, the equitable jurisdiction of the U. S. District Court to determine whether appellant's claim was dischargeable, and the necessity of exhausting state remedies as a prerequisite to the exercise of the Court's injunctive power, are not in issue.

Appellant, in his Conclusion (Appellant's Brief, p. 46), states:

"Essentially, we submit, the issue presented is whether, as a matter of law, this Court can determine that the Referee below erred in taking extrinsic evidence and in reconsidering a fraud judgment entered after a default by the judgment debtor." That is not exactly the issue in this case because there was no fraud judgment. Assuming, but not conceding, that the failure of the appellant to attach a copy of said judgment to his creditor's claim and the failure of appellant to introduce into evidence a copy of said judgment in the proceedings before the Referee are not fatally defective to appellant's case, we submit that the basic issue is whether the Referee was justified in taking evidence to determine whether or not the debt sued on in the Superior Court action was, in fact, created by fraud, in view of the uncertainty of the judgment.

An examination of the record reveals that the debt relied on by the appellant was incurred in the ordinary course of respondent's business and was not a debt induced by respondent's fraud, and that respondent came to California in an effort to make a new

start in life and not to be burdened by his pre-existing obligations. Appellant has taken advantage of respondent's financial difficulties and has obtained a default judgment on a complaint, one of whose causes of action alleges fraud. Although the issue of fraud was never actually litigated, nor was fraud ever actually proved in the State Court action, appellant seeks to take advantage of respondent's failure to respond to his complaint and is saying that because the complaint alleges, among other things, fraud, and because a default was entered on that complaint, that the debtor's discharge in bankruptcy is of no effect against this creditor and that this creditor may harass the debtor until the debtor is either in some way able to satisfy the claim or to relocate himself outside of the creditor's grasp.

ARGUMENT

I.

THE RESOLUTION OF THIS APPEAL MUST TAKE INTO ACCOUNT THE UNDERLYING PURPOSE OF THE FEDERAL BANKRUPTCY ACT.

In Local Loan Co. v. Hunt, 292 U.S. 234 (1934), the United States Supreme Court sustained a decree enjoining a creditor from proceeding to enforce an assignment of wages. In upholding the lower court's exercise of its injunctive power to so restrain the creditor, the Supreme Court stated:

"One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight

of oppressive indebtedness and to permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes'. Williams vs. U. S. Fidelity & G. Co., 236 U.S. 549, 545-555. This purpose of the Act has been again and again emphasized by the courts as being a public as well as private interest, in that it is to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. (Citing numerous cases) . . . The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the Act. Local Rules subversive of that result cannot be accepted as controlling the action of a Federal Court."

II.

THE UNITED STATES DISTRICT COURT MAY TAKE EXTRINSIC EVIDENCE TO DETERMINE THE CHARACTER OF THE DEBT WHICH ALLEGEDLY HAS NOT BEEN DISCHARGED BY BANKRUPTCY.

There is abundant authority that in ascertaining whether a udgment was discharged in bankruptcy, the Court may go behind he Judgment, examine the entire record, and determine therefrom he nature of the original liability, and when necessary, extrinsic vidence may be received for the purpose of determining the haracter of the debt.

Pepper v. Litton, 308 U.S. 295, 307-308 (1939);

Greenfield v. Tuccillo, 129 F.2d 854, 856 (2nd Cir.);

Swig v. Tremont Trust Co., 8 F.2d 943, 945 (1st Cir., 1925);

U. S. Credit Bureau v. Manning, 147 Cal.App.2d 558, 561 (1957);

Yarus v. Yarus, 178 Cal.App.2d 190, 196 (1960);

Fidelity & Casualty Co. v. Golombusky, 133 Conn. 317, 51 A.2d 817.

Appellant in his opening brief at page 26, cites and quotes itzgerald v. Herzer, 78 Cal.App.2d 127 (1947) as follows:

"Whether a judgment is cancelled by a Discharge in Bankruptcy depends on the nature and the character of the liability for which it was recovered. Therefore, in ascertaining whether the judgment upon which the

instant action is based was discharged, the Court will go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and when necessary, extrinsic evidence will be received for the purpose of determining the character of the debt. (Cases cited)."

The above general principle is stated in the Referee's Conclusion of Law III. Appellant admits the correctness of this general principle in his opening brief where he says at page 29:

"Our grievance with the Referee is not in the general law which he sets forth in Conclusions of Law I, II and III, but in his application of those rules."

Appellant goes on to state that the rule that extrinsic evidence may be admitted to show the true character of a debt does not apply where there has been a judgment in a State Court action alleging fraud and the judgment has been entered pursuant to the defendant's default. Here we come to the crux of this appeal: whether extrinsic evidence of the character of the underlying debt can be heard by a Referee where there is a judgment by default in a State Court action in which one of the causes of action alleges fraud?

It is stated by appellant that the general rule is that a defendant admits the truth of the material allegations of a complaint,

which are well pleaded, if the defendant defaults. Whether this is, or should be, the rule in a bankruptcy proceeding, is another matter. It seems relatively easy for collection agencies and small loan companies to include in their complaints a cause of action for fraud and to submit an affidavit that technically supports the fraud allegations. And it is a matter of common knowledge that debtors often will permit a default to be entered because they contemplate going through bankruptcy and obtaining a discharge of the obligation. And they are unaware that in the later bankruptcy proceeding the judgment creditor will rely on the allegation of fraud and the affidavit in support thereof to make the debt non-dischargeable. The debtor is thus lulled into a sense of security and is unaware that the complaint which he has been called upon to answer contains a trap to the unwary. The concept that a defaulting defendant admits the material allegations of a complaint is a highly technical one at best and does not truly reflect any debtor's actual state of mind and should not be applied in bankruptcy matters, and if applied, should be very strictly construed.

The principal cases relied upon by appellant are Fitzgerald v. Herzer, 78 Cal. App. 2d 127 (1947); Van Epps v. Aufdenkamp, 38 Cal. App. 622, and Wilson v. Walters, 19 Cal. 2d 111 (1941).

Before discussing these cases, let us clearly establish the relevant facts of the instant case. A complaint was filed in the Los Angeles Superior Court alleging three common counts for $3,991.93 and a fourth count for $3,990.50, the fourth being a cause of action alleging false pretenses and fraudulent representa-

ions (Appellant's Exhibit "A"). An affidavit was submitted to the Court in the above Superior Court action and a judgment was entered for $3,990.50, plus interest and costs. The affidavit (Appellant's Exhibit "B") established the amount of the debt; to wit, $3,990.50 but it did not, in the opinion of the Referee, establish that the basis of the debt was fraud. In the words of the Referee (R.T., p. 2):

> "I cannot bring myself to feel that there were actually false representations in this case. . . . A review of the Exhibit attached to the complaint and the affidavit filed in the State Court action would indicate that this was nothing more than an ordinary business transaction. . . . "

The two crucial points, and the points which will distinguish the instant case from those quoted by appellant are first that the judgment did not purport on its face to be a judgment for fraud, and second, that the record of the State Court action contained an affidavit that negatived any possible inference that fraud was present.

Now, let us examine the three California cases principally relied on by appellant. First, Fitzgerald v. Herzer, supra: There, the complaint in the State Court action alleged that the defendant had driven in a wanton, reckless and negligent manner. The defendant defaulted and judgment was thereupon entered. The judgment in that case purported on its face to be one for conduct not dischargeable by bankruptcy; to wit, wanton misconduct.

Neither did the record contain an affidavit that would have negatived the inference of wantonness purportedly raised by the defendant's default. In the instant case, the State Court Judgment did not purport on its face to be a judgment on the fourth cause of action for fraud. The fact that the amount of the judgment was for the amount claimed in the fraud count and not for the amount claimed in the other three counts is of no significance. The State Court could have determined that the affidavit established both that the amount of the debt was the amount alleged in the fraud claim and also that the basis for recovery was any or all of the first three counts and not the fourth. The judgment is thus, at best, ambiguous as it does not purport to be a judgment on any particular cause of action. In view of the patent ambiguity of the judgment itself and in further view of the existence of an affidavit which would suggest that the judgment probably was not based on fraud, the Fitzgerald case, where neither of these two factors was present, cannot be authority in the instant action.

The second case cited by appellant is Van Epps v. Aufdenkamp, supra. In that case the complaint in the State Court alleged an unlawful conversion and a judgment was entered upon the default of defendant. The Court there held that such a conversion was willful and malicious and that therefore, the judgment based thereon was not discharged by the bankruptcy. The judgment in that case was not ambiguous, nor was there an affidavit that would have cast doubt on the willfulness and maliciousness of the defendant's conduct; therefore, Van Epps is clearly distinguishable.

In Wilson v. Walters, supra, the creditor filed suit on two ounts, the first alleging breach of contract, and the second lleging fraud. Defendant stipulated for judgment in accordance ith the allegations of the complaint and the judgment itself recited at it was in accordance with the allegations of the complaint. In iew of that, the Court held that the defendant in that action could ot thereafter deny the fraud nature of the judgment. Thus in Vilson, both the stipulation and the judgment specifically and nambiguously encompassed both the contract count and the fraud ount. In the instant case, there was, of course, no stipulation, nd the judgment did not unambiguously refer to the fraud count. herefore, Wilson is also distinguishable.

Appellant has neither quoted nor cited any case in which ie purported rule that a default admits the material allegations of complaint, has been applied where it is uncertain whether or not ie judgment is on the fraud action, or where in addition to the mplaint alleging fraud there is other evidence in the record (in is case, an affidavit) which contradicts any inference of fraud that ight have been raised by the failure to answer.

However, there are a number of Federal cases which ggest that where the judgment is ambiguous or where a record gatives an inference of fraud, a default will not be conclusive. hus, in Williams v. Colonial Discount Company, 207 F. Supp. 362 .D. Geo. 1962), at page 368, the Court remarked:

"It has been said that although the pleadings in the State Court might show willful and malicious

injury, if the rest of the record negatives such character, the judgment is dischargeable. See Collier on Bankruptcy, 14 ed. Vol. I, p. 16, 17 containing the following:

" 'Where a judgment has been obtained, the Court which is called upon to determine whether the judgment is dischargeable, may resort to the entire record to determine the wrongful character of the act.' "

Personal Industrial Loan Corporation v. Forgay, 240 F. 2d 3 (10th Dis. 1956), contains the following significant language:

"The default judgment it obtained was merely for the amount of its claim and did not purport to be a fraud judgment. In fact, the judgment did not refer to fraud in any way."

Thus, the Court in that case emphasized the importance of a judgment unequivocally referring to fraud if that judgment is to be a basis for objecting to a debtor's discharge, even in the presence of a default.

In re Caldwell, 33 F. Supp. 631 (N. D. Geo. 1940), involved a State Court Default Judgment upon a complaint in deceit. The Court there held that the complaint did not unambiguously refer to fraud within the meaning of the Bankruptcy Act, and that therefore the judgment obtained thereon was not conclusive of the issue. In

ne words of the Court:

> " . . . or if the allegations of the petition are vague, ambiguous, or indefinite, or mere conclusions of the pleader, then the judgment rendered on such petition will be construed to be an ordinary judgment dischargeable in Bankruptcy."

Thus, the Court laid particular emphasis on the need in a ate Court complaint for allegations that are unambiguous and efinite. We submit that this case is authority for the proposition at for the judgment to be conclusive it also must be unambiguous d definite. The Court in that case went on to conclude:

> "If creditors, with their expert credit men, were as diligent in investigating the responsibility of applicants for credit and as prudent in distilling it, as they are persistent and sometimes oppressive in attempting to collect after the indebtedness has been incurred, there would be fewer claims of fraud and attempts like this to defeat a discharge in bankruptcy."

It is submitted that that Court looked with a jaundiced eye the efforts of a creditor to convert a purely business debt for e purchase of merchandise into non-dischargeable fraud. This urt should look with the same jaundiced eye toward this creditor's milar attempt.

The District Court's decision in that case was affirmed in Davison-Paxton v. Caldwell, 115 F. 2d 189 (5th Cir. 1940), where the Court laid down the following general policy consideration:

> "A remedial statute like that of bankruptcy intended for the relief of debtors, must insofar as denial of discharges and therefore of relief, be construed strictly so that all debts except those coming exactly within the exception will stand discharged."

In the instant case the complaint contained several counts, one of which was for fraud, but the judgment did not contain a finding of fraud, nor did it specially refer to the fraud count. Hence the only cases truly relevant are those where there is a default in respect to a complaint alleging several counts, only one of which is dischargeable, and where the judgment thereupon entered does not clearly indicate it is being based on the non-dischargeable count.

Two such cases are Valdez v. Sams, 134 Colo. 488, 307 P. 2d 189 (1957), and Freedman v. Cooper, 126 N. J. L. 177, 17 A. 2d 609 (1957), both being Supreme Court decisions of their respective states.

In Freedman, supra, the complaint "made the allegations of negligence usual in automobile damage suits including inter alia the allegation that defendant's automobile was driven 'in such other (sic) reckless, careless, willful, wanton and negligent manner as to evince a reckless disregard for human life and

afety' . . . and a default judgment was entered."

The Court then posed the question: "Was the judgment one hat by its nature was not subject to release by a discharge in ankruptcy? . . . " In determining that the judgment was dischargeable, the Court reasoned as follows:

> "In the present case the judgment could have been upon one or more of a variety of theories upon which the complaint was grounded, . . . In so far as I can determine from the proofs and papers before me the act upon which recovery was had was one of negligent driving. . . . I am not disposed under these circumstances to hold that the judgment is for willful and malicious injuries."

Freedman was quoted with approval in Valdez, supra. here the Court said: "We are in accord with the views expressed by the Supreme Court of New Jersey in Freedman v. Cooper . . . ". Freedman was specifically approved by the Colorado Supreme Court in an opinion which expressly rejected the views expressed in Fitzgerald v. Herzer, supra, on which appellant relies so avily. To quote the Valdez decision:

> "The case is one of first impression in this jurisdiction, and we are not impressed with the reasoning of the California Court of Appeal in Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P. 2d 364. . . . "

In Valdez, the question before the Court was:

"Where in an action to recover judgment for damages resulting from an automobile collision, the complaint contains an allegation that the defendant was guilty of negligence consisting of a 'reckless or willful disregard of the right or safety of others'; and where default of defendant was entered and thereafter the court heard evidence in support of the allegation of the complaint and entered judgment without specifically finding that more than simple negligence was shown . . . is the debt evidenced by the judgment an obligation which is extinguished by a discharge in bankruptcy?"

he Court concluded:

"The question is answered in the affirmative. . . . If plaintiffs desired to protect themselves against the possibility that defendant might seek a discharge in bankruptcy, it was incumbent on them to secure a specific finding in the trial court that the negligence of defendant was such that a discharge in bankruptcy would not operate to release the judgment. No such finding was made."

On the basis of the above two decisions, we submit that if ppellant herein wishes to rely on the State Court judgment by fault as conclusively establishing a non-dischargeable debt: to t, fraud, his State Court affidavit should have set forth facts

howing fraud and his State Court judgment should have been pecifically on the fraud cause of action, and should have included finding of fraud. Otherwise a non-dischargeable obligation would e created without the creditor having to prove the non-dischargeble nature of the debt. The policy considerations implicit in the ankruptcy Act preclude such a result.

III.

A PERMANENT INJUNCTION WAS APPROPRIATE AND IT WAS NOT NECESSARY TO MAKE A SPECIFIC FINDING OF FACT THAT THE STATE COURT REMEDY WAS INADEQUATE.

In In re Caldwell, 33 F. Supp. 631, supra, the U. S. District ourt permanently enjoined the creditor from undertaking to nforce the judgment obtained in the State Court or from in any way ttempting to collect that judgment. No specific finding of fact as made that the State Court remedy was inadequate, and on peal in Davidson-Paxton v. Caldwell, supra, the District Court's ermanent Injunction was upheld. It is submitted on the basis of te above case, that the Federal Courts have the discretion to isue a Permanent Injunction without making an express and ecific finding of inadequacy of State remedy.

The broad discretion Federal courts have in issuing injunctons to prevent State Court enforcement of discharged judgments i discussed at length by the United States District Court in Personal ldustrial Loan Corp. v. Forgay, 140 F. Supp. 473 (D. C. Utah, 1956).

The Court cited and discussed a number of cases in which use of the injunctive power was upheld, summarizing with a statement referring to the "almost unlimited scope of facts upon which injunctive relief has been granted".

The Court went on to discuss the policy considerations underlying the liberal use of the Federal Courts' injunctive power, emphasizing the general inadequacy of a State Court remedy. The Court concluded:

> "Almost invariably loan company creditors contest the discharge of bankrupt upon the ground that the loan was induced by fraud and is not dischargeable. A judge comes to learn that such objections to the discharge must be scrutinized with great care. . . . If the Loan Company's view is upheld there will be no more objections to discharges filed in the bankruptcy court in cases of this kind. Loan companies will seek default judgments in the city courts."

We think that the judge's attitude toward the practice of obtaining a default judgment in a State Court on a complaint alleging fraud is apparent.

For another case discussing the inadequacy of State remedies, see Seaboard Small Loan Corp. v. Ottinger, 50 F. 2d 56 (CCA 4, 1931).

It should be especially noted that appellant cites no case in which a federal court's issuance of an injunction restraining

collection of a State Court judgment on a dischargeable debt has ever been reversed. And with good reason. For as the Court said in Forgay, supra, the facts upon which injunctive relief has been granted are "almost unlimited (in) scope".

IV.

APPELLANT WAIVED ANY OBJECTION HE MIGHT HAVE HAD TO THE INTRODUCTION OF EVIDENCE ON THE NATURE OF THE UNDERLYING DEBT.

Appellant did not at the time of the original hearing object o the introduction of evidence of the true character of the debt iving rise to the State Court judgment. It is a general rule of vidence that objections to evidence not made at the time such vidence is offered are waived. United States v. Aluminum Co. of merica, 35 F. Supp. 820. Having treated the nature of the under- ying debt as in issue at the hearing, appellant waived his right to hallenge the referee's taking evidence on that issue.

CONCLUSION

In view of the patent ambiguity of the State Court Judgment and in further view of the Affidavit submitted to the State Court which negatived the existence of fraud within the meaning of the Bankruptcy Act, it is urged that the Referee acted within established principles when he took evidence to determine the true nature of the obligation sued on in the State Court. It is further urged that the issuance of a Permanent Injunction was proper in view of the United States District Court's inherent power to implement its orders for discharge in bankruptcy matters.

Respectfully submitted,

BLANCHARD & CRISPI and

RICHARD H. LEVIN

By /s/ Richard H. Levin
RICHARD H. LEVIN

Attorneys for Respondent.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with those rules.

/s/ Richard H. Levin
RICHARD H. LEVIN

No. 18796

In the United States Court of Appeals
for the Ninth Circuit

RAY BRUMFIELD and AL LAMOTTE,
Plaintiffs-Appellants,

vs.

TRUCK INSURANCE EXCHANGE,
Defendant-Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF IDAHO,
SOUTHERN DIVISION

APPELLANTS' BRIEF

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CITATIONS

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APPELLANTS' BRIEF

JURISDICTION

This is an appeal from an order entered the 15th day of May, 1963, by the Honorable Fred M. Taylor, United States District Judge, District of Idaho, Southern Division, granting the defendant's motion for summary judgment in the above entitled matter. (Tr. 84-86) On the

25th day of October, 1962, the appellants filed a complaint for declaratory judgment in the United States District Court for the District of Idaho, Southern Division. (Tr. 4) This appeal is taken from a summary judgment granted therein. (Tr. 84-86)

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and cost, exceeds $10,000.00. (Tr. 4)

The appellants are citizens and residents of the State of Idaho, domiciled at Council, Valley County, Idaho. The defendant-appellee is a foreign insurance company incorporated and doing business under the laws of the State of California and authorized to do business in the State of Idaho, and having one of its offices at Boise, Ada County, Idaho. (Tr. 4) Accordingly, the District Court had jurisdiction, 28 USCA 1332, and this court has jurisdiction to review such matters as those on appeal, 28 USCA 1291, Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF CASE

Joseph Johnson, the owner of two trucks, contracted with the Boise Cascade Corporation for the hauling of logs from what is known as the "south burn" near Banks, Idaho, to the Boise Cascade Mill at Emmett, Idaho.

The appellant, Brumfield, was the owner of a loader and Al LaMotte was the operator of said loader. (Tr. 17 line 14) On December 27, 1961, Mr. Joseph Johnson backed his logging truck under the loader for the purpose of obtaining a load of logs. (Tr. 22 lines 4-16) After Mr. Johnson's truck was partially loaded, a log which was placed upon the load by Mr. LaMotte, flipped and struck Johnson on the leg, breaking his leg. (Tr. 55-56 lines 7-25 & 1-11) The loading operation was directed by Mr. Johnson when the accident occurred. (Tr. 62 lines 6-11) Johnson brought suit for damages against the operator and owner of the loader. Such action was filed in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Adams. (Tr. 4 lines 28-32) The appellants, Brumfield, owner of the truck and LaMotte, operator of the loader, brought this action for declaratory judgment in the United States District Court to determine the liability, if any, of appellee Johnson's insurer.

The policy of insurance contained the following:

> "3. (a) (3). With respect to the described automobile or a substitute automobile, any employee of the named insured, provided the actual use of the automobile is under the direction and control of the named insured and is in the course of his employment with the named insured." (Emphasis ours) (Tr. 77)

The policy further provides in Paragraph 3 (f), "Use

of the automobile includes the loading and unloading thereof." (Tr. 77)

It is the position of the appellants that LaMotte, operating the loader, under the direction of Johnson, appellee's insured, in loading Johnson's truck, was an "insured" under the policy and that appellee must therefore defend Johnson's State court action and respond to any judgment rendered for the plaintiff therein. The defendant, Truck Insurance Exchange, took the deposition of Al LaMotte, operator of the loader and said deposition has been filed herein. The defendant, Truck Insurance Exchange, moved for a summary judgment, which was granted on the 15th day of May, 1963. This appeal is taken therefrom.

QUESTION INVOLVED AND MANNER IN WHICH IT IS RAISED

The sole question presented on this appeal is whether or not LaMotte while operating the loader under the direction of Johnson became the employee of Johnson under the "loaned-servant doctrine" thus placing LaMotte within the "insured" portion of appellee's policy.

SPECIFICATION OF ERRORS

1. The court erred in sustaining appellee's motion for summary judgment.

2. The court erred in entering judgment and dismissing appellants' complaint.

3. The court erred concluding in its order, dated and entered May 15, 1963, "That the plaintiffs were not 'loaned servants' of Joseph Johnson (the named insured in defendant's policy) and, therefore, not insured by the terms of defendant's policy."

ARGUMENT

I

The court erred in concluding in its order dated and entered May 15, 1963, "That the plaintiffs were not 'loaned servants' of Joseph Johnson (the named insured in defendant's policy) and, therefore, not insured by the terms of defendant's policy."

To ascertain the amount of direction and control involved in this case, it is necessary to place the litigants in their proper prospective within the logging industry.

The Boise Cascade Corporation conducts the major percentage of the lumber business in southern Idaho. This corporation's activities actually produces fringe employment for the industry's labor force although such persons' names do not appear on the payroll of the corporation (Tr. 32) Messrs. Johnson and LaMotte and Brumfield fall within this fringe area.

Both Messrs. Johnson and Brumfield are comparatively small operators in the logging field. They load and haul Boise Cascade's logs on a board foot basis to the Emmett Mill. (Tr. 17-19) They own their own equipment and employ the necessary operators. In the instant case, Mr. Johnson was the owner and operator of his own truck. Neither Mr. Brumfield nor Mr. Johnson can survive in the industry without the cooperation of the other. Mr. Johnson cannot afford to own and operate a loader and Mr. Brumfield cannot afford to own and operate a fleet of trucks.

The loading operation requires the skill and technique of an experienced operator. (Tr. 20-22) The trucker, aware of the capabilities of his own machine, must direct and control the loader during this operation. The primary reason for the control and direction by the trucker lies in the fact that he alone is responsible for his load. (Tr. 45 lines 12-25) If he loses the load or injures a third party with it, he cannot look to the loader for contribution. The trucker's personal safety depends upon the placement of the load. During the loading operation he stands in the most advantageous position to direct the loading operation. It must be remembered that the loader's skill is in the operation of his machine, not in the placement of the logs. The trucker's commands are directed to the loader by means of hand signals indicating where to place each individual log.

Appellants maintain that during the logging operation, the loader is the temporary employee of the trucker. It is true that he cannot discharge him from the general employment. He can, however, discharge him from his temporary employment by ordering him to stop the loading operation. We are only concerned here with the direction and control over the employee, LaMotte, at the time of the injury.

The necessity of this direction and control by the trucker is amply emphasized in that Mr. Johnson's complaint is that LaMotte failed to follow his directions, thus causing the injury.

The following quotes are taken from Mr. LaMotte's deposition and we set them out for the court's convenience:

> "Q. Now up in this area where you were working December 27, were the logs of a uniform size or were there a lot of different size logs involved?
>
> A. Well, they varies, some small to larger logs." (Tr. 22 lines 4-8)
>
> Q. Now the driver will stand upon the cab or behind this bang board you speak of?
>
> A. Yes, over on the bang board.
>
> Q. That is on top of the cab of his truck?
>
> A. Yes.
>
> Q. And when you have placed the log in its loaded position he will climb down and release your tongs for you?"

"A. Yes, sometimes--now he will have me shove a log forward so he can step off this bang board on to the log and then we have what we call a cat walk, you put on two or three logs on the bunk and two or three in the middle and you have this bang board to climb down and out, just step down on the logs and out."
(Tr. 39-40 lines 20-25 and 1-9)

"Q. At any time in the course of this operation did you take orders from the truck driver?

A. Yes, when the logs come up over the truck they motioned to me where they wanted to put the logs, what position they wanted it.

Q. Would that be on any log?

A. Generally.

Q. Or just certain logs?

A. Just any log, wherever they wanted me to put it I put it in place.

Q. You would go along with the truck driver's preference where he wanted it?

A. Yes, wherever he wanted the log laid.

Q. Of course, you were the loader, wouldn't you know pretty well where the logs ought to be so you could give him a good load so it wouldn't shift?

A. I would have a pretty good idea but he had to haul the logs." (Tr. 44 lines 1-20)

"Q. Did he have an advantage point upon the cab that was better than the one you had to tell how the load was going on?

A. Yes.

Q. He could see better from up there than you could?

A. Yes." (Tr. 45 lines 3-9)

"Q. In the course of loading the trucks, how would he communicate his desires to you?

A. He generally just pointed where he wanted them--just over here or over there (indicating).

Q. Would this be the case of you fellows actually working along together and getting this thing loaded?

A. Yes.

Q. And not a case of somebody being the boss?

A. We just kinda worked together--of course, he was in charge of his load." (Tr. 45 lines 12-25)

"Q. Actually it was a case of you people working as a team?

A. Well, actually I tried to put them where he wanted them." (Tr. 46 lines 1-4)

"Q. On this bottom tier that you said held the stakes of the truck, if he wanted a particular log from the deck to fit in good could he point out some particular log that he wanted you to load?

A. Yes, he could.

Q. In other words, he then could decide what logs he wanted and where to put them on his load?

A. Yes." (Tr. 62 lines 11-19)

In the case of Snetcher and Pittman v. Talley, 168 Okl. 280, 32 P.2d 883, (1934) the Supreme Court of Oklahoma faced the question as to whether or not the direction and control alone was sufficient under the "loaned-servant doctrine." S and P maintained a boiler repair shop. They contracted with Oklahoma Boiler Works for the use of an air hammer and a riveter.

Oklahoma Boiler Works sent the claimant who was paid by them and hired by them to operate the riveter. S and P. through their foreman directed the claimant when to start and stop the machine and generally supervised the method in which the work was done. The claimant received an injury while engaged in the work for S and P. The court at page 884 states:

> "S and P placed much importance upon the fact that Oklahoma Boiler Works hired and paid claimant, and urged this argument in contending that claimant was the employee of the Oklahoma Boiler Works and not the employee of S and P.
>
> "In this connection, in Arnett v. Hayes Wheel Company, 201 Michigan 67, 166 NW 957, 960, the facts were similar to the facts in the instant case, and the Supreme Court of Michigan in discussing whether or not the relation of master and servant existed said:
>
> 'But it is argued that Arnett was the servant of the Jackson Company because employed and paid by it. Ordinarily these are strong factors in determining the question but they are not controlling where it is shown that the employee was actually under the control of another person during the progress of the work. (Citing cases) ' "

Continuing the court stated on page 884 and 885:

> "The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master, or becomes subject to that of the person to whom he is later hired."

In Crutchfield v. Melton, 270 P.2d 642, the Supreme

Court of Oklahoma states the applicable rules under the "loaned-servant doctrine" at page 645:

> "It is well settled that one who is the general servant of another may be loaned or hired by his master to another for some special service so as to become, as to that service, the servant of such third person.
>
> "Servant lent by master to another for particular employment, although remaining general servant of master, must be delt with as servant of one to whom he is lent, as regards anything done in the latter's employment.
>
> "In determining whether general master of servant or person to whom servant was lent is liable for servant's acts, neither payment of wages nor power to hire and discharge is controlling."

The court continues:

> "The question to be answered in making a determination is in the act which the servant was performing at the time. Was he in the business of and subject to the direction of the temporary employer as to the details of such act?"

In Pinson v. Minidoka Highway District, 61 Idaho 731, 106 P. 2d 1020 (1940), Pinson was hired by the Reclamation Service and paid by the United States Government and directed by them to work under the orders of the Highway Engineer. The Highway District took the position that Pinson was not an employee of the Highway District; the Idaho court states at page 1022, quoting Standard Oil Company v. Anderson, 212 US 215, 29 S. Ct. 252, 53 L. Ed., 480, the rule by which to determine

whether a person is an employee is stated as follows:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If the other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become prohavice the servants of him to whom they are furnished."

To determine whether a given case falls within the one class or the other we must inquire for whom is the work being performed--the question which is usually answered by ascertaining who has the power to control and direct the servant in the performance of his work. At page 1022 of 106 P. 2d the court said:

> "The general test is the right to control and direct the activities of the employee or the power to control the details of the work to be performed and to determine how it should be done and whether it shall stop or continue that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer and liable for compensation."
> (Citing authorities)

Counsel for defendant-appellee, in the trial Court cited the case of Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 P. 2d 400, for the proposition that "the decisive and ultimate factor is whether the allegedly loaned employee can be replaced

or discharged at the will of the temporary employer." We do not agree that such was the decisive point in the Nissula case.

The facts in the Nissula case were that Nissula owned a D-7 Caterpillar Tractor which he volunteered with his brother as operator for use on Southern Idaho Timber Protective Association lands for fighting a forest fire. The operator of the tractor was in the employ of the plaintiff and while the cat and operator were used on the fire, the plaintiff was paid by the defendant a fixed rate per hour which included use of the tractor and operator. The defendant's foreman, one Monte Cross, directed the operator to take the tractor up the side of a mountain to dig a trench as a fire break, but on objection of plaintiff that the terrain was too rough and rocky to safely operate the tractor, the defendant's fire warden ordered the tractor brought down and it was put to work skinning logs off the road near the campground. Shortly thereafter, the foreman Cross again ordered the tractor up on the hillside a short distance from where it had originally been. It became lodged against a stump and because the hill was so steep and rough the tractor could not be moved, and it was greatly damaged by fire.

The plaintiff brought suit for damages to the tractor and for loss of use of the tractor during the period it was under repair. The trial court granted a non-suit on

the ground that the operator of the tractor was employed by the plaintiff and that the damage was caused by the operator's own negligence. The Supreme Court reversed the decision and granted a new trial; the court stated at page 43:

> "The operator had been directed to take orders from Cross, and there is evidence that in going up on the hillside the second time and in pushing brush and dirt at the point where the tractor became stalled, he acted upon specific directions from Cross. As to such acts he was under the control of, and was as to such acts the servant of, the defendant, although at the same time he was the servant of the owner in the manipulation of the machine itself. 1 Restatement of Agency, Sec. 227. So if, under the circumstances, it was negligent to direct the operator to take the tractor up on the hillside and to push brush and dirt in the manner done, and the damage proximately resulted therefrom, then the defendant would be liable. These were questions of fact for the jury."

The court did not hold that the status of "loaned employee" could not be established where there was not complete control of the operation by the named insured, but simply that because the plaintiff supplied the operator for the tractor, plaintiff could not base his claim for damages on negligence of the operator. The court specifically held that even though the operator of the tractor was the employee and agent of the plaintiff, nevertheless, as to the specific operation under way at the time the tractor was damaged, there was sufficient

evidence to go to the jury on the question of whether or not the operator of the tractor at that time was the loaned employee and under the direction of the defendant.

The Nissula case, therefore, supports our contention herein that although LaMotte was hired by, under the general direction of, and paid his compensation by Brumfield, the allegations of Johnson's complaint in the State court that the cause of the injury to Johnson was negligent acts done and performed by LaMotte in loading the Johnson truck, places LaMotte under the coverage of the loading and unloading clause of defendant-appellee's policy. As to the entire operation of placing the logs on the Johnson truck, LaMotte was a loaned employee of Johnson.

In the case of Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 P.2d 369, the plaintiff Cloughley was employed by Detweiler, Inc., on a construction job at the A.E.C. Reactor Station. Detweiler, Inc., was consignee of two boilers shipped f.o.b. job site by Consolidated Freightways to Idaho Falls and then by way of the defendant Orange Transportation Company to the job site. The defendant Park operated the Orange truck-tractor in making the delivery.

Detweiler's foreman, a Mr. Pearcy, advised Park that he, Pearcy, had arranged for a crane to unload the boilers. When the crane arrived, Pearcy told plaintiff

to go on top the boilers to fasten the cables for the unloading operation and then to remain on top of the boiler or on top of the truck to watch the operation. It was arranged between Park and Pearcy that Park would operate the truck during the unloading, the plan being to raise the boilers by means of the crane, then drive the truck from under the boiler and lower it to the ground. Park was told to watch for signals from Pearcy as to when to move the truck forward and when to stop. When the boiler was raised, it became wedged in the trailer and as the truck moved five to twelve feet forward, it flexed the boom of the crane and under this stress the boom collapsed and fell across the top of the boiler. Plaintiff then jumped from the top of the trailer to the ground to avoid being struck by the falling boom. He brought this action to recover damages for injuries allegedly suffered as a result of the jump. Plaintiff alleges negligence on the part of Park, acting as agent and servant of Orange Transportation Company, in failing to halt the forward motion of the truck upon signal of Pearcy.

Defendants contended that while driving the truck to assist in the unloading, Park was a loaned servant and employee of Detweiler, Inc., and that Workmen's Compensation is plaintiff's sole and exclusive remedy. The trial resulted in a verdict and judgment in favor of plaintiff and defendants appealed. The Supreme Court

reversed the judgment and ordered the case dismissed, holding that plaintiff was a loaned employee and therefore that Workmen's Compensation was his only remedy.

The court stated at page 234:

> "It is clear from the evidence that it was the duty of Detweiler, Inc., the consignee, to unload the boilers and that Detweiler, Inc., recognized that duty and actually took charge of and performed the unloading operations. From this it follows that Park, in operating the truck during the attempted unloading on September 2, was the temporary loaned employee of Detweiler, Inc. Therefore, Park was a co-employee or fellow servant of plaintiff. Neither Park nor his general employer, Orange Transportation Company, were third parties against whom plaintiff could maintain a tort action for damages under Section 72-204, Idaho Code. * * *
>
> "In Pinson v. Minidoka Highway District, 61 Idaho 731, 106 P.2d 1020, the rule for determining who at the particular time is the employer, was stated as follows:
>
> 'The general test is the right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation.' "

The court in the Orange Transportation case then went on to quote from the Pinson case to the effect that it is well established that the rule to the effect that the

question of the identity of the person who pays compensation is not controlling and is a circumstance which is decisive or determinative of the question whether a person to whom an employee is lent becomes his employer.

In Brown v. Arrington Construction Company, et al., 74 Idaho 338, 262 P.2d 789, defendant Arrington Construction Company was employed on an oral contract by Bonneville County to construct a bridge across a canal and also to remove debris consisting of the old bridge and bridge abuttments with a drag line. The defendant, Skinner, an employee of defendant Arrington Construction Company, operated the drag line.

During the course of the work in removing the debris, the County sent the plaintiff Brown to the job site with a road grader to make a detour for traffic to go around the place where the drag line was operating. While driving the grader past the drag line, the boom on the drag line came in contact with electrical power lines and apparently the grader somehow touched the drag line, causing Brown to be knocked unconscious and severely burned by the electric current.

The defendant Arrington Construction Company contended that its driver, Skinner, was a "loaned employee" of the County in the removal of the debris and for that part of the work the drag line and its operator were

loaned on a hourly basis to the County.

The court held that the evidence presented a jury question as to whether Skinner was under the direction of the defendant Arrington Construction Company or in fact under the direction and control of the County at the time of the accident and further pointed out that "there was a conflict in the evidence as to whether such work was done as an extra item in connection with the verbal contract for the building of the new bridge."

It is interesting to note that the court in the **Brown** opinion quoted **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37 at page 342:

> "We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do. The quotation in such case from **1 Restatement of Law of Agency**, Sec. 227, seems particularly appropriate to the case at bar and is as follows:
>
> " 'A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other servant as to some acts and not as to others.' "

As clearly pointed out in the Nissula case, the mere fact that the driver or operator of the tractor (or in this case the loader) was under the general direction and control of the owner of the machine does not prevent the operator from being, on certain occasions, a loaned employee of another. The determinative factual question is as to who has direct supervision and control was the particular operation which caused the injury. In the Nissula case, although the plaintiff's brother had for some time been employed by plaintiff as operator of the tractor and the operator and tractor were together loaned to the defendant and even while employed on the fire job for the defendant the plaintiff had some direction and control over the place where and the manner in which the tractor was to be used, nevertheless, the Supreme Court held that the fact that direction for use of the tractor at the time it was placed in the position of peril and was burned by the fire was under the direction of the defendant and that defendant could be, in those situations, the employer for the purpose of determining liability for negligent acts.

Likewise, in the Orange Transportation case, although the defendant Orange Transportation Company was the general overall employee of the truck driver, nevertheless, supervision of the loading operation was assumed by the Detweiler Company, which was also the employer of the plaintiff, and therefore the court held there was

a fellow-servant relationship between plaintiff and the person causing the damage because such person at the time of the accident was under the direction and specific control of Detweiler's employee.

We submit that under the rule of the Idaho Supreme Court cases, LaMotte, operator of the loader, in loading the logs on the Johnson truck, was a "loaned employee" of Johnson and under the defendant-appellee, Truck Insurance Exchange's policy was a named insured. The defendant-appellee Truck Insurance Exchange must, therefore, assume its responsibility to defend the suit brought by Johnson against Brumfield and LaMotte and to stand ready to pay any damages awarded as such insurer.

Dated this 1 day of November, 1963.

Respectfully submitted,

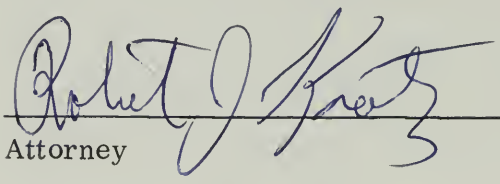
ELAM, BURKE, JEPPESEN
& EVANS

By KARL JEPPESEN
A Member of the firm
408 Idaho Building,
Boise, Idaho

Attorneys for appellants

Service of the foregoing Brief of Appellants is hereby accepted by receipt of a copy thereof this _____day of_____, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney

No. 18,796

In the United States Court of Appeals
for the Ninth Circuit

RAY BRUMFIELD and AL LAMOTTE,
Appellants,

vs.

TRUCK INSURANCE EXCHANGE,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF IDAHO,
SOUTHERN DIVISION

APPELLEE'S BRIEF

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SUBJECT INDEX

Table of Authorities Cited

CASES

STATUTES

RULES

No. 18,796

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Appellee.

APPELLEE'S BRIEF

STATEMENT RE JURISDICTION
(Rule 18(B) 9th Cir.)

Pleadings in this case establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-7), as follows:

A. Diversity of Citizenship.

Plaintiffs-Appellants: Citizens of the State of Idaho.

Defendant-Appellee: Corporation organized under the laws of the State of California and authorized to do business in the State of Idaho, with offices in Boise, Ada County, Idaho, and with principal place of business in the State of California.

B. Amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

C. Appeal.

This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division, dismissing plaintiff's complaint (Tr. page 86), and is appealable to this Court pursuant to the provisions of 28 U.S.C.A. 1291 and Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Although appellants' statement of the case is generally correct, appellee feels that certain facts have been omitted which bear directly on the issues joined. Also, in that portion of their brief entitled "Argument", appellants make reference to matters not contained in the transcript on this appeal. For these reasons, a restatement of the case as supported by the transcript is necessary. Parties will be referred to by name.

Ray Brumfield was the owner of a loader or jammer designed and used to load logs on logging trucks. He had contracted with Boise Cascade Corporation to load

logging trucks in the woods near Banks, Idaho, compensation to be based upon quantity of timber handled. (Tr. pages 17, 18, 25 and 64.) Mr. Brumfield had hired Al LaMotte to operate this loader, and Mr. LaMotte was in the course of the performance of the Brumfield-Boise Cascade contract when this accident occurred. Mr. Brumfield was not physically present at the time and place of the accident, which occurred at a logging operation at a remote location in the forest. (Tr. pages 17-19, 70 and 71.) Joseph Johnson also had a contract with Boise Cascade Corporation, but he was engaged in hauling logs, and his compensation received from Boise Cascade for performance of his contract was strictly as a trucker, and not as an operator of a loader. (Tr. page 70.)

Basically, the work was done at the logging camp by drivers such as Johnson bringing their trucks into the camp with a trailer mounted on the cab. The trailer would be removed, placed on the ground, and hooked to the tractor or cab. The loader would then be used to put the logs on the trailer. The truckdriver customarily remained at the area and took an interest and a part in the loading operation, and from time to time, would express a preferance as to the particular log to be loaded and the operator of the loader, such as Mr. LaMotte, would normally comply with the trucker's wish in this respect. Furthermore, the trucker was

customarily entitled to express his preference as to the placement or location of the logs as they were loaded, and his signals as to the place where a log should be dropped or placed were customarily honored and complied with by the operator of the loader. (Tr. pages 27, 28, 35-48 and 71.)

On December 27, 1961, Joseph Johnson drove his truck alongside Brumfield's loader to get a load of logs. The loading operation was commenced and carried out in the usual and customary manner as set forth above. At the time the accident occurred, Mr. Johnson's truck was being loaded and Mr. LaMotte was operating the loader. Johnson was positioned atop the logs on his truck that had previously been loaded and had, immediately before the accident, indicated to Mr. LaMotte where a particular log should be placed on top of the load, which log, while being lowered into position on the truck, was dropped by Mr. LaMotte, evidentally injuring Mr. Johnson. (Tr. pages 17-30, 55, 56, 70-72.)

During the loading operation, only the owner of the loader, Ray Brumfield, had authority to remove Mr. LaMotte as operator of the loader, or otherwise select the person to operate his loading machine. Likewise, the truckdriver, Mr. Johnson, had no control or authority over LaMotte's actual operation and manipulation of the loader. The manner in which the loader was run

was entirely up to Al LaMotte and Ray Brumfield. Nor did Mr. Johnson have authority to stop Al LaMotte or to start him in the performance of his work. (Tr. pages 29, 30, 44-48, 52, 64, 72 and 73.)

Subsequent to his injuries, Mr. Johnson brought suit for damages against LaMotte and Brumfield. Said action was commenced in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Adams. In this complaint, Mr. Johnson alleged that his truck was being loaded with logs through the use of a loader owned by Ray Brumfield and being operated by Al LaMotte, and that as a proximate result of the negligence of Al LaMotte, a log fell on and injured Joseph Johnson. (Tr. pages 4 and 5.) The State Court action prosecuted by Johnson is predicated solely upon Al LaMotte's alleged negligence in the manipulation and operation of the Brumfield loader. (Tr. pages 4 and 5.)

At the time of Johnson's accident, his truck was insured under a policy of liability and accident insurance issued by appellee to Joseph Johnson, who was the named insured in said policy. (Tr. page 5.)

The insuring clauses contained in this policy obligate appellee to pay all damages which the insured becomes legally obligated to pay, as well as defend any suit against the insured for such damages, arising out of the ownership or use of the insured's truck. (Tr. page 77.)

Similar coverage is extended to the named insured's employees in the event the following conditions of the policy are met:

> "III. (b) (3). With respect to the described automobile or a substitute automobile, any employee of the named insured, provided the actual use of the automobile is under the direction and control of the named insured and is in the course of his employment with the named insured."
>
> "VI. Use of the automobile includes the loading and unloading thereof." (Tr. page 77.)

After the State Court action was filed by Johnson, appellants brought this action for a declaratory judgment in the United States District Court for the District of Idaho to determine the liability, if any, of Johnson's insurance carrier, appellee herein, under this policy of insurance. (Tr. page 4.) In support of their right to relief, appellants alleged that they were "loaned servants" of Joseph Johnson at the time of the accident and therefore qualify as "insureds" under the loading and unloading coverage of the policy. (Tr. page 5.) In opposition to this complaint, appellee, Truck Insurance Exchange, moved for summary judgment of dismissal which was granted on May 15, 1963, from which this appeal is taken.

The sole issue raised by this appeal is whether Ray Brumfield and Al LaMotte were the employees of Joseph Johnson at the time of the accident thereby giving them

status of an "insured" under appellee's said policy.

ARGUMENT

PART I.

JOSEPH JOHNSON DID NOT HAVE AUTHORITY TO REPLACE APPELLANT, AL LAMOTTE, AT THE CONTROLS OF THE LOADER.

Appellants seek an adjudication that they were Joseph Johnson's loaned servants at the time Johnson was injured. Whether Al LaMotte and Ray Brumfield achieved this status is the singular issue presented by this appeal.

Joseph Johnson was apparently injured when a log was lowered on his leg by Al LaMotte. At this precise moment, LaMotte was operating the controls of the loader in an effort to place a log at its intended resting point on Johnson's truck. (Tr. pages 55, 56 and 61.) It is the gravamen of appellants' argument that LaMotte was the loaned servant of Johnson at this very moment, i.e., while LaMotte was actually manipulating the controls on the loader in an effort to place the log.

Under the law of Idaho, the relationship of "loaned servant" cannot exist when the purported temporary master lacks authority to replace the borrowed employee

at the controls of his machine. In the absence of this authority, the original employment relation continues as to the operator's acts in manipulating his machine. It is not altered by the fact that he is subject to the control of his alleged temporary employer as to where to go and what work to do. The absence of this single element is sufficient in itself to render nugatory the claim of "loaned servant".

By appellant LaMotte's own admission, Johnson had no authority whatsoever to replace him at the controls of the loader. This function was the prerogative of Ray Brumfield, the owner of the loader. We direct the court's attention to the deposition of Al LaMotte, which is replete with declarations to the effect that Johnson had no authority to replace him or select the operator of the loader.

> "Q. Now let me ask you this, did Mr. Johnson at the time you were loading his truck have any right or authority to order you to get out of your cab and to stop operating the loader? Would he have that kind of authority?
>
> "A. You mean to just get clear out of the machine?
>
> "Q. Yes.
>
> "A. No, not to get out of the machine.
>
> "Q. Would he have any authority to replace you and have somebody else operate the loader?
>
> "A. No.
>
> "Q. That was between Mr. Brumfield and you, I take it?

"A. Yes." (Tr. pages 46-47.)

"Q. Would anyone other than Ray have had the authority to take you off that machine or replace you or fire you up there?

"A. No. Ray was the man that was hiring me and could fire me if he chose.

"Q. And as far as authorizing anyone to operate the loader, Mr. Brumfield was the only one that had that authority, I take it?

"A. That's right, the company could have replaced the machine and me by just laying the machine off.

"Q. Cancelled the contract, in other words?

"A. Yes." (Tr. page 48.)

"Q. If you were ready to load now you would load and that was your decision, was it not?

"A. Yes.

"Q. Nobody could tell you and the truckdriver couldn't -- in other words, he could not determine when you did it?

"A. Say he wanted to move out for another truck to get by so he could park, something like that, I would wait for him.

"Q. Some reasonable basis?

"A. Yes.

"Q. As far as the question when the loading was to be done and so forth, this would be your decision, would it not?

"A. Well, I was to go to work at a certain time and quit at a reasonable time of the night.

"Q. What I had in mind, of course, your boss Mr. Brumfield was in this thing on a board foot basis; that is the way he got paid, wasn't it?

"A. That is right.

"Q. And when the truck was there to be loaded and he had a right through his employees to get on and get that truck loaded and out and get another one loaded and out, did he not?

"A. Yes.

"Q. So no truckdriver could designate to the loader operator to slow down or stop or wait?

"A. No, we were getting paid by the hour.

"Q. This was within your authority, wasn't it?

"A. I was to get every log out I could get and still be safe -- safe operation.

"Q. That is what I was getting at, the time when you worked and how fast, that was your authority and the truckdriver had no authority in that, did he?

"A. No." (Tr. pages 63-64.)

We also refer the court to the affidavit of Joseph Johnson, who the appellants claim was their temporary employer during the loading operation. For the court's convenience, we quote portions of this affidavit:

"During the entire loading process on the day of my accident, I had no control or authority over LaMotte's operation of the loader. The manner in which the loader was run was entirely up to LaMotte and Brumfield.

"I have no authority to select the person who will operate Brumfield's loader, or any of the other loaders in the Burns Creek operation.

"If LaMotte had ever refused to load my truck, there is nothing I could have done about it." (Tr. pages 72-73.)

PART II.

THE RELATIONSHIP OF "LOANED SERVANT" CANNOT EXIST WHEN THE PURPORTED TEMPORARY EMPLOYER LACKS AUTHORITY TO REPLACE THE PURPORTED LOANED SERVANT AT THE CONTROLS OF HIS MACHINE.

The latest expression of the Idaho Supreme Court on the subject of "loaned employee" is found in the following cases: Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400 (1952); Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 Pac.2d 369 (1958); and, Brown et al v. Arrington Construction Company et al, 74 Idaho 338, 262 Pac. 2d 789 (1953). Under the authority of these decisions, the decisive and ultimate factor is whether the allegedly "loaned employee" can be replaced or discharged from the controls of his machine at the will of the "temporary employer".

Alluding to the Nissula decision, it appeared that the plaintiff was the owner of a caterpiller tractor which he rented to the defendant, Southern Idaho Timber Protective Association, to be used by the defendant for fighting forest fires. The plaintiff's brother, who had been employed by the plaintiff to operate this particular tractor for some time, was designated to operate the tractor in the course of the fire fighting for the defendant. Plaintiff was compensated for the use of the tractor on

the basis of an agreed rate per hour for the tractor and operator as a unit, with fuel, oil, grease and expenses incidental to its operation. In the course of the operation of the tractor, the defendant had complete control over the operator as to where to go, what work to do and how the work was to be done. During the fire fighting operation, defendant's foreman ordered the tractor taken to a hillside where it became stuck and subsequently damaged in the fire. Plaintiff brought the action to recover damages to the tractor and for its loss during the period it was under repair.

Defendant contended, inter alia, that the driver of the tractor was still the employee of the plaintiff, that the damages complained of were caused by the negligence of the operator, therefore, the plaintiff had no cause of action against the defendant. Plaintiff, in turn, urged that the operator of the tractor under the "loaned servant rule" became the servant of the defendant during the operation of the tractor, and that any negligence on the operator's part while so engaged was imputed to the defendant.

At the close of all the evidence the defendant moved for a directed verdict which was granted. Plaintiff then prosecuted an appeal to the Supreme Court of Idaho which reversed the trial court entering an order for a new trial. It is pertinent to note that Fred M. Taylor,

then one of the attorneys of record representing the plaintiff on appeal, is the Federal District Judge who entered the order of dismissal in the present action.

The Supreme Court reviewed all of the evidence produced at the trial bearing on the negligence of the operator himself and the defendant's negligence in directing the operator to move the tractor into a dangerous area. The court concluded that the evidence was conflicting on these points and the plaintiff should have been entitled to submit the issue of negligence to the jury, which right was denied him by the directed verdict. In discussing this aspect of the case, the court noted and expressly held that the operator was the loaned servant of the defendant as to the operator's acts in moving the tractor into the dangerous area because he was directed to do so by the defendant's agent, while on the other hand, the operator remained the servant of the plaintiff in the actual manipulation and operation of the machine itself. We quote from the court's opinion wherein this notion is vividly demonstrated:

> "Here the operator was selected and paid by plaintiff. The plaintiff retained the right to discharge him and substitute another. At least no inference can be drawn from the record that the defendant had the right to replace him. Under these circumstances, as to his acts in handling and operating the tractor, he remained the servant of the owner. And as to such acts, this relationship is not altered by the fact that he was subject to the

> control of the defendant as to where to go and what work to do." Page 42. (Emphasis ours.)

The Brown case, 74 Idaho 338, 262 Pac. 2d 789, presented a similar issue. Respondent Brown brought the action for personal injuries against defendant Skinner and appellant Arrington Construction Company. Arrington had a contract with Bonneville County to construct a new bridge across a canal. The County had torn down the old bridge but had no way of removing the debris. The County, therefore, arranged with Arrington for the removal of this debris by a mobile dragline and operator. Defendant Skinner, the operator provided by Arrington, took the dragline to the site and was told by the County employees what to do.

Brown was employed by the County and was operating a grader in the vicinity of where Skinner was working with the dragline. During the course of Skinner's operation, the dragline hit a power line and the current ran through Skinner's machine to the ground, injuring Brown.

Brown contended that Arrington was liable for his injuries due to the negligence of its servant, Skinner. Appellant Arrington contended, however, that any negligence on the part of Skinner could not be imputed to it because Skinner was the servant of Bonneville County under the "loaned servant" doctrine. The trial court entered judgment against appellant which was affirmed

on appeal. In the course of its opinion, the court quoted extensively from the **Nissula** case, supra, saying:

> "In **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37, 245 Pac. 2d 400, a tractor and its operator were rented to defendant. We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine, but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do." (Emphasis ours.)

As these authorities indicate, the vital and ultimate factor determinative of a "loaned servant" status is the right of the temporary employer to replace the temporary servant. The operator's acts in the manipulation of his machine, in the absence of this right, are in law those of his regular employer.

If any doubts remained after these decisions, they were dispelled by the Idaho Court in its opinion in the **Cloughley** case, 80 Idaho 226, 327 P. 2d 369. In this case, plaintiff was employed by Detweiler, Inc. Defendant Park was regularly employed as a truckdriver by defendant, Orange Transportation Company. Detweiler was the consignee of a shipment consisting of two boilers, transported by Orange to Detweiler's building site. Park

was the driver of the diesel tractor owned by Orange which delivered the boilers. When Park arrived at the job site he was told by Detweiler's superintendent, Pearcy, to park the trailer in a certain place and await the arrival of a crane to unload the boilers. When the crane arrived, Pearcy told plaintiff to go on top of the boiler and remain there during the unloading operation. Pearcy told Park to operate the truck during the unloading, the plan being to raise the boiler by means of the crane, then Park would drive the truck from under the boiler, and the boiler would be lowered to the ground. Pearcy advised Park that he would station himself near the rear of the truck and by means of signals, would indicate to Park when to move forward and when to stop. During the course of the operation, the boiler became wedged in the trailer, causing the boom of the crane to swing laterally, forcing plaintiff to jump to the ground to avoid injury. Plaintiff suffered injuries as a result of the jump and brought this action. His claim was based on the negligence of Park, allegedly acting as servant of Orange, in driving the truck in a negligent manner during the unloading operation.

Defendant Orange contended that while Park was driving the truck to assist in unloading, he was a loaned servant and employee of Detweiler, Inc., thereby making him a fellow servant of the plaintiff and limiting plaintiff's recovery solely to the Workman's Compensation

Law benefits.

Under the rules of the Interstate Commerce Commission, which were applicable in this transaction, it was the duty of Detweiler, Inc., the consignee of the boilers, to perform the unloading operation.

The court held that Park was the loaned servant of Detweiler, Inc., and plaintiff's sole remedy was under the Workman's Compensation Laws. In support of his position, plaintiff argued that the driver of the truck, regularly employed by the defendant, remained in the defendant's employ during the unloading operation, citing and relying on the Nissula case for authority. We would like to quote in full from the court's opinion regarding this contention:

> "Plaintiff cites and relies upon Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400. In that case the defendant rented a tractor with its operator from the plaintiff to be used in fighting a forest fire. The tractor was damaged by fire, which plaintiff charged to the negligence of the defendant. Defendant charged the damage was caused by the negligence of the operator, who remained the servant of the owner. It was there held that if the operator was selected by the owner, who retained the right to discharge him and substitute another, then in the manipulation and operation of the tractor itself, the operator remained the servant of the owner even though subject to the control of the defendant as to where he should go and what work he was to do. A non-suit having been granted in that case the cause was remanded for a new trial on the issue

> as to whose negligence caused the injury." (Emphasis ours.)

The court then proceeded to distinguish the **Nissula** case from the case under consideration, saying:

> "That case is not in point here, because in this case Park (driver) need not have been used in the unloading operation and could have been replaced at the wheel of the tractor by another driver at the will of Detweiler, Inc." (Emphasis ours.)

In the **Cloughley** case, the temporary employer had the right to replace the driver of the truck by virtue of the rules of the Interstate Commerce Commission. In the **Nissula** case, the alleged temporary employer did not have authority to replace the operator of the caterpiller, although in the latter case the purported temporary employer had control over the operator in respect to the details of the work to be done and the manner in which it was to be performed. This fundamental distinction was aptly brought to focus by the court in the **Cloughley** opinion.

The undisputed facts in the present case have a striking resemblance to the factual pattern of the **Nissula** and **Brown** cases. Here the purported temporary employer, Joseph Johnson, had limited control over appellant, Al LaMotte's operation of the loader, in that Johnson, pursuant to customary practices followed in lumber operations of this kind, could select the logs LaMotte was to

load and direct where these logs were to be placed on Johnson's truck.

However, Johnson had no authority whatsoever to replace LaMotte at the controls of the loader, or otherwise select the individual who would operate the loader. This being the case, any acts on the part of Mr. LaMotte in respect to his manipulation and operation of the loader remained in law the acts of his original employer, Ray Brumfield, and did not become the acts of Joseph Johnson.

It is clear that Ray Brumfield was not and could not be the "loaned servant" of Johnson.

PART III.

THE AUTHORITIES CITED AND RELIED UPON BY APPELLANTS DO NOT SUPPORT THEIR POSITION.

Appellants rely upon the following decisions: Brown v. Arrington Construction Company, 74 Idaho 338, 262 Pac.2d 789; Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 Pac.2d 369; Crutchfield v. Melton, 270 Pac.2d 642; Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400; Pinson v. Minidoka Highway District, 61 Idaho 731, 106 Pac.2d 1020; Snetcher and Pittman v. Talley, 168

Okla. 280, 32 Pac.2d 883.

All of these decisions are from Idaho, except Crutchfield and Talley, which are Oklahoma cases. It goes without saying that the Oklahoma opinions are not the law of Idaho and cannot be considered as such. In fact, the holdings in these cases, even though they may represent the law of Oklahoma, are totally and absolutely irrelevant to these proceedings in view of the attitude taken by the Idaho Court on the "loaned servant" doctrine. In short, there is no need to look beyond the Idaho Courts for authoritative material on the subject when the law has been so firmly established in this jurisdiction.

The case of Pinson v. Minidoka Highway District, 61 Idaho 731, 106 Pac.2d 1020, is likewise cited by appellants. This was an action for benefits under the Workman's Compensation Laws and presented the question whether the deceased worker was an employee of appellant at the time he became ill, from which illness he subsequently died. The deceased was regularly employed by another and lent to the appellant for the purpose of operating a jackhammer. During the course of his operation of the hammer deceased became ill and later succumbed. Appellant had general authority to supervise deceased's work.

It was held that the deceased was an employee of appellant under the liberal definition of "employee" in

the Workman's Compensation Laws and he was therefore entitled to benefits. The case did not, in any wise, involve circumstances similar to those in the suit at bar, but even if it had, it would no longer represent the rule of decision in Idaho, for the reason that it was decided prior to the **Nissula**, **Cloughley** and **Brown** cases.

Appellants also devote considerable time to a discussion of the **Cloughley**, **Nissula** and **Brown** cases. It is their contention that these opinions support their position, notwithstanding the clear language and obvious intent of the Supreme Court in these cases, to which we again make reference:

Nissula, 73 Idaho 37, 245 Pac. 2d 400, decided in 1952:

> " . . . as to his acts in handling and operating the tractor, he remained the servent of the owner."

Brown, 74 Idaho 338, 262 Pac. 2d 789, decided in 1953:

> "In **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37, 245 Pac. 2d 400, a tractor and its operator were rented to defendant. We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine, but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer

was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do."

Cloughley, 80 Idaho 226, 327 Pac.2d 369, decided in 1958:

"Plaintiff cites and relies upon Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400. In that case the defendant rented a tractor with its operator from the plaintiff to be used in fighting a forest fire. The tractor was damaged by fire, which plaintiff charged to the negligence of the defendant. Defendant charged the damage was caused by the negligence of the operator, who remained the servant of the owner. It was there held that if the operator was selected by the owner, who retained the right to discharge him and substitute another, then in the manipulation and operation of the tractor itself, the operator remained the servant of the owner even though subject to the control of the defendant as to where he should go and what work he was to do. A non-suit having been granted in that case the cause was remanded for a new trial on the issue as to whose negligence caused the injury."

We respectfully submit that the Idaho Supreme Court has expressed itself in no uncertain terms on the issue of "loaned servant" in cases involving the operation and use of equipment. Based on these holdings, the appellants were not the loaned servants of Joseph Johnson when Johnson sustained the injuries for which he prosecuted his State Court action. Consequently, these appellants do not qualify as "employees" within the

purview of appellee's insurance policy and the trial court's judgment should be affirmed.

Dated this 3rd day of January, 1964.

Respectfully submitted,

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By Wayne C. Thomas

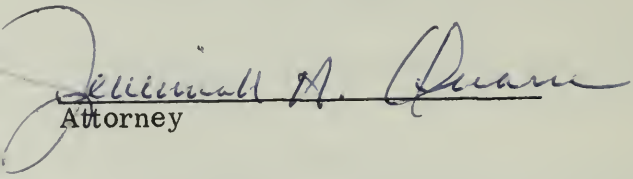
By Jeremiah A. Quane
of the firm

Service of the foregoing Brief of Appellee is hereby accepted by receipt of a copy thereof this 3rd day of January, 1964.

Elam, Burke, Jeppesen & Evans,

I certify that, on connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance

with those rules.



Attorney

NO. 18801 ✓

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE,	)
	)
Appellant,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF ALASKA

BRIEF FOR APPELLANT

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On November 4, 1960, the grand jury filed in the District Court for the District of Alaska, at Fairbanks, an indictment charging Richard W. Burge with violations of the law concerning the traffic of illegally imported narcotic drugs (Sec. 174, Title 21, USC) as follows:

"Count I of the indictment charges:

That on or about the 23rd day of April, 1959, at Fairbanks within the District of Alaska and within the judisdiction of this Court, Richard W. Burge did knowingly receive, sell and facilitate the sale of a narcotic drug, to-wit, heroin, to Hazel Geary after it being imported or brought into the United States, the said Richard W. Burge knowing the heroin to have been imported or brought into the United States contrary to law all in violation of 21 U.S.C.A. 194."

"Count II of the indictment charges:

That on or about the 23rd day of April, 1959, at Fairbanks within the District of Alaska and within the jurisdiction of this Court, Richard W. Burge did knowingly conceal and facilitate the transportation of a narcotic drug to-wit, heroin after it being imported or brought into the United States; the said Richard W. Burge knowing the heroin to have been imported or brought into the United States contrary to law, all in violation of 21 U.S.C.A. 174."

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Title 18, U.S.C., Sec. 231, and Title 48, U.S.C., Sec. 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Title 28, U.S.C., Secs. 1291, 1294.

STATEMENT OF THE CASE

Richard W. Burge, the appellant, had been employed and living in Anchorage, Alaska during the time relevant to the events leading up to this case (Tr. 257). He had come to Fairbanks on the 18th of April, 1959, to institute a business venture with one Arthur Bell; some sort of cardroom (Tr. 266).

Burge accepted a room in a two bedroom dwelling house at 774 17th Street, Fairbanks, rented and partially occupied by one Dolores Jean Wright (Tr. 98). He became associated, at a party on the night of April 20, 1959, with one Hazel Geary (Tr. 15-17, 46-49, 261-263).

From approximately noon on the 23rd of April, 1951, there were present at the premises at 774 17th Street, on various occasions and in various combinations, Burge, Arthur Bell, Dolores Jean Wright, Hazel Geary, and at least two taxicab drivers (Tr. 28-30, 229-232, 274-286). At approximately 7:20 P.M., Wright, Geary and Burge left the house in Burge's auto. After dropping Miss Wright off at a nearby beauty shop, Burge drove to the vicinity of the Idle Hour Cafe, several blocks from 774 17th Street, and parked his auto (Tr. 30-31). At approximately 7:30 P.M., Burge and Geary were arrested at the Idle Hour Cafe, purportedly upon information from Geary that a pre-arranged purchase of narcotics from Burge had been effected (Tr. 31). Dolores Jean Wright was arrested shortly thereafter, at the beauty parlor (Tr. 94).

Burge was subsequently indicted under Title 21, U.S.C., Sec. 174, and charged in two counts with dealings in the traffic in illegal narcotics. Count I charged that he "did knowingly receive, sell and facilitate the sale of a narcotic drug, to-wit heroin, to Hazel Geary". Count II charged that he "did knowingly conceal and facilitate the transportation of a narcotic drug, to-wit, heroin".

The account of the events of April 20-23, upon which the United States proceeded, was gleaned mainly from the accusations of Geary. She testified to the following: Burge first approached her with a proposal to "dump a large quantity of heroin" on April 20 (Tr. 15). She demanded a sample before she would do business on a larger scale (Tr. 17). She then went to officers Barkley and Calhoon for money to purchase her sample (Tr. 18, 19). She then proceeded to make her "buy" (Tr. 20). The officers did not see fit to move in and make an arrest when Geary asserted the "buy" had been made; they merely took her "outfit" and planned a bigger "buy" with her (Tr. 23).

On the 23rd of April, Geary was given $400.00 in marked bills (Tr. 24). She proceeded first to the Model Cafe for about a half hour, and then on to 774 17th Street, arriving there about 1:30 P.M. (Tr. 24, 25). She testified that Burge asked her to see her money, made trips about the house and away in his car, and finally appeared with two glass jars (heroin and milk sugar) and "cut" the heroin on front of

his prospective customer (Tr. 25-27). He then sold her this mixture in a prophylactic (Tr. 27). This sale is supposed to have taken place about 2:30 P.M. (Tr. 27). Though Geary was supposed to have given a visual signal to police as soon as possible after the "buy" (Tr. 54-55), she continued in the house watching TV (Tr. 29), and eating snacks (Tr. 28) until about 7:15 P.M.; then, upon leaving, gave no signal which could be detected by police (Tr. 30).

Police had 774 17th Street under surveillance throughout all this time (Tr. 229-230), and the Burge car as well (Tr. 230). After the arrests they moved in to search 774 17th Street, upon the alleged "consent" of Dolores Jean Wright. They found a jar of milk sugar (Tr. 131), but no jar of heroin. Though Geary surrendered the heroin she claims to have bought (Tr. 32-33), no narcotics were found in Burge's possession or in his auto (Tr. 202-205), nor was there any evidence of marked money, at this time.

Though Geary admittedly had been convicted of a felony (Tr. 39-40), charge were presently pending against her for forgery (Tr. 39-40) and for this narcotics violation, and she was admittedly an addict (Tr. 33, 34) and a prostitute (Tr. 38), the prosecution did not call Dolores Jean Wright, whose direct testimony could not be impeached for her complicity in the alleged crime. Jackie Bell, the other person conspicuous by his presence at 774 17th Street throughout much of the afternoon, disappeared and could not be found.

The marked money was found seven days after the arrests took place, in a space behind the headlight section of Burge's car (Tr. 235-237). An anonymous source of information is said to have been the clue as to where to look for the money (Tr. 235).

As to Count I of the indictment, the plaintiff offered: The testimony of Geary of two consummated purchases of narcotics from Burge, as a police informant (Tr. 20, 27-29); some corroboration by police officers of her status as an informant (Tr. 133-137, 228-229); testimony by police officers of access of Burge to Geary on the day of the arrest; a hypodermic needle and eyedropper evidencing a trace of narcotic received from Geary, constituting Exhibit A (Tr. 83); a small plastic bottle, the contents of which were identified to be heroin and milk sugar, received from Geary and constituting Exhibit B (Tr. 84-85); a white jar recovered from the medicine cabinet in the bathroom of the premises at 774 17th Street, evidencing a fingerprint identified as that of the accused, the contents of which were identified to be milk sugar, constituting Exhibit C (Tr. 86, 165-166); an eyedropper and a needle evidencing a trade of narcotic, obtained from the medicine cabinet in the bathroom of the premises at 774 17th Street, constituting Exhibit D, but later stricken (Tr. 130, 167-168); money obtained from a space behind the headlight section of the auto belonging to Burge, identified as having been marked by police and given

to Geary to effect a purchase of narcotics (Tr. 236-237); and testimony of access by Burge to the front portion of his auto on the day the sale is asserted to have taken place (Tr. 190-191, 207-208). Mr. Burge freely admitted association with Geary on the day of the arrest (Tr. 272-286), but denied any knowledge of the presence of narcotics (Tr. 271, 229-302), or of dealings therein (Tr. 264, 271, 291, 299-302); or of the presence of milk sugar (Tr. 297); or of any large amount of money in the possession of Geary (Tr. 291); or of any access to the front section of his auto, except in the company of a service station attendant (Tr. 278-279).

The plaintiff offered no evidence in support of Count II, except that to be implied from the evidence offered in support of Count I, and unless the transporting of Geary to the point at which she was arrested and found to be in possession of a substance identified as heroin, could be said to be evidence of facilitating the transportation of narcotics.

At the close of plaintiff's evidence, defendant's motion for judgment of acquittal was denied. At the close of all the evidence, defendant's renewed motion for judgment of acquittal was denied.

As to Count I, the jury could not reach a verdict. As to Count II, the jury found the defendant had knowingly concealed and facilitated the transportation of a narcotic drug.

After judgment and sentence, this appeal followed.

STATEMENT OF POINTS

1. The Court erred in refusing to suppress Exhibits "C" and "D", being articles obtained from an unlawful search of the premises at 774 17th Street. Exception was taken.

2. The Court erred in admitting Exhibits "C" and "D" into evidence, the same being articles obtained from 774 17th Street by means of an illegal search and seizure. Exception noted.

3. The Court erred in finding that consent had been given, voluntarily, to the search of 774 17th Street by Dolores Jean Wright. Mere acquiescence is not consent. Exception was taken.

4. The Court erred in denying defendant's motion to suppress certain evidence, made in advance of trial.

5. The Court erred in admitting Exhibit "D" into evidence, there being no evidence whatever connecting said exhibit with the defendant. The action of the Court in withdrawing this exhibit in the closing minutes of the trial could not cure the error. Exception was taken to the admission of this exhibit.

6. The Court erred in instructing the jury as it did in Instruction No. 9. There was no evidence in the record covering the factual situation contemplated by this instruction, and the giving of the instruction was bound to have the effect of confusing the jury. Exception taken.

7. The Court erred in instructing the jury as it did in Instruction No. 10. There was no evidence whatever that the defendant had ever exercised any "constructive possession" of

the narcotic in question, nor was there any evidence whatever that the alleged possession of the defendant was "joint". There was no evidence that two or more persons in the case had shared either actual or constructive possession of the narcotics. Under the circumstances, the giving of this instruction was bound to confuse the jury. Exception noted.

8. The Court erred in instructing the jury as it did in Instruction No. 12. No question of intent was involved in the case. Exception was taken to the giving of this instruction.

9. The Court erred in instructing the jury as it did in Instruction No. 13. No question of intent was involved in the evidence. Exception was taken to the giving of this instruction.

10. The Court erred in instructing the jury as it did in Instruction No. 21. This instruction invites the jury to disregard the testimony of the defendant completely. Exception was taken to the giving of this instruction.

11. The Court erred in denying defendant's motion for judgment of acquittal, made at the close of the evidence offered by the Government.

12. The Court erred in denying defendant's renewed motion for judgment of acquittal, made at the close of all the evidence.

13. The verdict on Count II of the indictment is contrary to the weight of the evidence.

14. The verdict on Count II of the indictment is not supported by substantial evidence.

15. Other manifest error appearing of record, to which objection was taken and exception reserved.

SUMMARY OF ARGUMENT

Though the record of the trial covers 328 pages, the plaintiff's case is based primarily upon the testimony of an informant, Hazel Geary. Her direct testimony covers only about 20 pages. All other evidence offered by the plaintiff is circumstantial and seeks to corroborate the testimony of Geary. It is our contention that most of this circumstantial evidence was received in violation of the defendant's right of privacy, as secured against unreasonable searches and seizures by the United States Constitution. We further contend that certain instructions given to the jury, over the objection of the defendant, were so far removed from the evidence and issues of the case as to mislead and confuse the jury, rather than to put the evidence in proper perspective with respect to the crimes charged. Finally, it is our contention that all the evidence offered by the plaintiff, when properly evaluated, was insufficient to permit a jury determination of the fact of guilt.

During the trial, we contend that the court committed reversible error in the following particulars:

1. The Court erred in admitting Exhibits C and D, and the testimony relating thereto, into evidence, in that as items obtained in an unlawful search of the premises at 774 17th Street, Fairbanks, Alaska, they were not admissible against the defendant.

2. The Court erred in admitting Exhibit E, and the testimony related thereto, into evidence, in that as an item obtained in an unlawful search of the defendant's automobile, it was not admissible against him.

3. The Court erred in admitting Exhibit D into evidence, there being no evidence offered to link the items to the defendant or to the crime charged; under the circumstances of this case, the subsequent withdrawal of this evidence from the jury did not cure this error.

4. Certain instructions given by the Court were so far unrelated to the issues and the evidence of this case as to confuse and mislead the jury. When considered collectively, these erroneous instructions invited a conviction on evidence which was not sufficient in law to constitute a crime under Title 21, Sec. 174.

5. The Court erred in giving its instruction respecting the credibility of the defendant's testimony. The tendency of the instruction to single out and discredit this testimony exceeded the boundaries of fair comment on the evidence properly within the province of the trial judge.

6. The Court erred in denying defendant's motion for judgment of acquittal made at the close of plaintiff's case, and renewed at the close of all the evidence. A review of the evidence reveals that a proper evaluation of the evidence establishes its inadequacy to foreclose a reasonable doubt of defendant's guilt, and the question should not have been submitted to the jury.

ARGUMENT

I. THE COURT ERRED IN ADMITTING EXHIBITS C AND D, AND THE TESTIMONY RELATING THERETO, INTO EVIDENCE, IN THAT AS ITEMS OBTAINED IN AN UNLAWFUL SEARCH OF THE PREMISES AT 774 17th STREET, FAIRBANKS, ALASKA, THEY WERE NOT ADMISSIBLE AGAINST THE DEFENDANT.

A. THE GOVERNMENT HAS NOT MET THE HIGH BURDEN OF ESTABLISHING THAT "CONSENT" TO A SEARCH WITHOUT WARRANT WAS GIVEN BY DOLORES JEAN WRIGHT.

During the course of the trial, two exhibits were admitted into evidence which had been obtained as a result of a search of the premises at 774 17th Street. These items consisted of Exhibit C, being a glass bottle containing a material identified as milk sugar, and Exhibit D, being a eye dropper and a hypodermic needle. Both items were allegedly taken from the bathroom of the house. At a later point in the proceedings, and before the case went to the jury, the court reversed the field as to the admission of Exhibit D, holding that the evidence failed to link this material to the defendant in any way, and the jury was instructed to disregard Exhibit D. Exhibit C, on the other hand, remained in evidence and may very well have been an important consideration to the jury, as it was connected to the defendant by testimony that his fingerprint was found on the bottle. The witness Geary had testified that a similar bottle had been used in the course of mixing the heroin which she purchased from the defendant. Thus, this item of evidence was vital to the government's case and was emphasized by the government in closing argument.

Both Exhibits C and D were the products of an unlawful search of the premises at 774 17th Street, and should have been excluded from the evidence. Admittedly, the search of 774 17th Street was made without a search warrant, although the officers testified that they had the premises under surveillance at all times and could have easily delayed the search until a proper warrant had been obtained. The 4th Amendment to the Constitution of the United States provides:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly in describing the place to be searched and the persons or things to be seized."

Having no search warrant, therefore, the search in question was obviously unlawful unless some other fact could be found to establish its legality.

In this respect, the government relied upon "consent" to the search, allegedly given by Dolores Jean Wright at about 10:00 o'clock on the evening of the arrests. In this connection, it should be noted that the alleged oral "consent" was given by Miss Wright to two law officers at a time when she was under arrest, charged with the illegal possession of narcotics, confined at the Federal Building without an opportunity to consult counsel or anyone else. It is highly significant that, a few minutes later, when an attempt was made to get Miss Wright to sign a written consent for search, she refused to do so. (Tr. 103).

The only testimony material to the question of whether consent was given relates to a conversation with Wright by Officers McQueen, McRoberts, and then a federal attorney, Yeager, which took place between 9:45 and 10:00 P.M. on the evening of Wright's arrest. Officer McQueen testified that she "gave verbal permission" (Tr. 103) and that "she said for us to go ahead, that she had no objections." (Tr. 108). McQueen further testified that when he presented a written waiver of search to Wright she refused to sign it saying, "You don't need that, you've got my permission." (Tr. 103). This latter testimony is highly suspect, for the fact of presenting Wright with a written consent at this time is contradicted not only by Wright (Tr. 96), but also by his fellow officer, McRoberts (Tr. 113). McRoberts testified, "the interview was negative, all but verbal permission to search her residence." (Tr. 110). He further testified that when asked if a search could be made, she answered, "Yes, that she had nothing to hide" (Tr. 113). United States Attorney Yeager was not called by the government to testify. This alleged "consent" took place, it is agreed, at approximately 10:00 P.M. The search began immediately.

It is submitted that a finding of "consent" on these facts was clearly erroneous. Here the government had the burden of coming forward with evidence to establish "consent" clearly, unequivocally, and convincingly. This burden is indeed high, for waiver of constitutional rights is not lightly

considered. Channel v. U.S., 285 F2d 217 (C.A. 9th Cir. 1960); Judd v. U.S., 190 F2d 649 (C.A., D.C. 1951). The test of the government's case in establishing consent in such a situation has been clearly defined in a recent 9th Circuit Case, U.S. v. Page, 302 F2d 81 (9th Cir. 1962). There, the court laid down the following rules:

> "The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given'. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. 'Courts indulge every reasonable presumption against waiver of fundamental constitutional rights'. Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." U.S. v. Page, supra, at 83-84.

While all the elements of implied duress or coercion are present here, the government has offered no evidence that there was "no coercion in fact". Further, the testimony offered by the government is not unequivocal, for the alleged statements of Miss Wright are entirely consistent with an expression of "false bravado", as pointed out in Channel. The government has offered no clear and positive testimony of the consent, but rather conclusory assertations and contradictory recollections. All the circumstances buttress the conclusion that if any consent was obtained it was contaminated by duress and coercion. Though Miss Wright was taken into custody at approximately 8:00 P.M., she is not alleged to have consented until approximately 10:00 P.M., even though a team had been

instructed to stand by her home to search it as soon as permission was granted. (Tr. 119). United States Attorney Yeager was not called to testify, although the nature of his training would have made him extremely sensitive to the nature of the alleged "consent", and his recollection thereby sharpened. All these circumstances, in addition to the admitted refusal of Miss Wright to sign a written waiver, command the court to indulge a "reasonable presumption against waiver of fundamental constitutional rights", as enjoined by this court in the Page case. This presumption has not been met with evidence. This finding of "consent" was clear error and should be reversed. Channel v. U.S., supra; Williams v. U.S., 263 F2d 487, 489-90 (C.A., D.C. 1959).

It is clearly established that the accused can assert the invalidity of this search as to Miss Wright and require that the evidence be suppressed. U. S. v. Jeffers, 342 U.S. 48 (1951); McDonald v. U.S., 335 U.S. 451, 458 (1948); Plazola v. U.S., 291 F2d 56, 63 (9th Cir. 1961). His standing to move to suppress under Rule 41(e) of Federal Rules of Criminal Procedure, here permitted by the court in the exercise of its discretion, is likewise clearly established. Jones v. U.S., 362 U.S. 257 (1960); Contreras v. U.S., 291 F2d 63 (9th Cir. 1961). The fact that the government wishes to prove his possession by the items secured, is sufficient to give the defendant "standing".

B. EVEN IF "CONSENT" OF WRIGHT COULD BE ESTABLISHED, IT COULD NOT DEFEAT DEFENDANT'S RIGHT

IN THE PREMISES AT 774 17TH STREET, TO BE SECURED AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Even assuming the government could have made out the fact of consent by Dolores Jean Wright, such consent would not validate the search as to the defendant. As indicated above, the premises located at 774 17th Street, Fairbanks, Alaska, were jointly occupied by Dolores Jean Wright and the accused. The premises at the address consisted of a small house, including two bedrooms, a living room, kitchen, bathroom, back porch, and basement. About a week before the arrest, defendant had come to Fairbanks in pursuit of a business venture and had run into Miss Wright. Conversation developed that he needed a place to stay and arrangements were made with Wright for the defendant to occupy one of the bedrooms in the house. Apparently, he also had the use of other parts of the house, including the living room and bathroom. The bottle of milk sugar, Exhibit C, was found in the bathroom. The defendant was never requested to give any "consent" to the search of the premises, nor did he do so at any time (Tr. 89). Miss Wright, although indicted, was not on trial. Under these facts, the defendant has a right of privacy protected under the 4th Amendment of the United States Constitution, independent of that of Wright. This right was violated when the search took place without his consent, and without a valid search warrant having been

executed against him.

It is admitted that Wright had an unqualified right to occupy parts of the premises at 774 17th Street, and perhaps a qualified right to enter the rooms that had been made available to the defendant. But in accepting the use of the rooms in Wright's home, the defendant did not authorize her to consent on his behalf to a search of those rooms. In fact, it was not shown that Wright had authority to act for the defendant in any capacity. The officers could not take advantage of Wright's limited use of or right to enter the rooms extended to defendant. Chapman v. U.S., 365 U.S. 610 (1961); Henzel v. U.S., 296 F2d 650, 651 (5th Cir. 1961); Cola v. U.S., 22 F2d 742, 743 (9th Cir. 1927).

Further, this right of privacy is not based upon any peculiar possessory interest in the premises, but upon actual occupancy of the accused. As set forth by the court in the Chapman case:

> "It is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historic. . . ."
>
> Chapman v. U.S., supra, 617.

See also U.S. v. Blok, 188 F2d 1019, 1021 (C.A., D.C. 1951). This development of the law of the right of privacy was anticipated early, and has been the law in this Circuit for some years. Klee v. U.S., 53 F2d 58 (9th Cir. 1931).

The court, in holding that its finding of consent was binding upon the defendant, relied upon two cases which are clearly distinguishable from the facts before us. Stein v. U.S., 166 F2d 851 (9th Cir., 1948), dealt with the authority of a woman to consent for her husband. The court was careful not to extend the argument to defendants other than her husband. U.S. v. Sferas, 210 F2d 69 (7th Cir. 1954) discusses the authority of a partner to authorize the search of partnership property. The statement is merely dictum, for there the defendant was held to have waived his right to suppress the evidence by failing to make a motion before trial. Once again, the case deals only with authority. As mentioned above, there is no question of authority in this case. Had Miss Wright assisted the officers in detaining the defendant's property against his wishes, she would have been guilty of larceny. The defendant's right of privacy is entitled to no less protection.

Objection to Exhibits C and D were raised by motion to suppress, made properly and timely (Tr. 86-129). Accordingly, Exhibits C and D should never have been admitted in evidence, and Exhibit C should never have remained before the jury. Without the weight of Exhibit C, it is doubtful if the jury would ever have returned a verdict of guilty on Count II, and a new trial should therefore be granted.

II. THE COURT ERRED IN ADMITTING EXHIBIT E, AND THE TESTIMONY RELATED THERETO, INTO EVIDENCE, IN THAT AS AN ITEM OBTAINED IN AN UNLAWFUL SEARCH OF THE DEFENDANT'S AUTO, IT WAS NOT ADMISSIBLE AGAINST HIM.

During the course of the trial, Exhibit E, consisting of $400.00 in 18 twenties and 4 tens, was admitted into evidence. The money was identified as that given to Geary to effect the purchase of narcotics. The evidence was linked to the defendant by testimony that it was recovered from the headlight section of his automobile. The automobile was taken into custody at the time of defendant's arrest, was impounded, and was never released. Admittedly, the search took place two or three days after the arrest (Tr. 13). No valid search warrant was ever issued or executed against the defendant as to this automobile or anything else. Defendant moved to suppress Exhibit E before trial, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, as the product of an unlawful search and seizure. The motion was denied. There is no question of the defendant's standing to make the motion, based on his proprietary interest in the car. The government relies upon the theory that search was reasonably incident to the arrest of the defendant. It is submitted that the admission of this exhibit is clearly erroneous and should be reversed.

Authority to make a search incident to a lawful arrest is limited not only to the confines under the immediate control of the defendant, but is also limited to a search contemporaneous with the arrest. Rent v. U.S., 209 F2d 893 (5th Cir. 1954); U. S. v. Stoffey, 279 F2d 924 (7th Cir. 1960). Cf. Shurman v. U.S., 219 F2d 282 (5th Cir. 1955).

Two or three days after the arrest is not "contemporaneous" with the arrest by any stretch of the language. The basis for the requirement is spelled out in the Stoffey case, where the court says:

> "The seizure of the car was not incidental to the arrest of the defendant. The arrest both in fact and in law was consummated before the car was seized. There was no risk of the car being driven away while a search warrant was being obtained. * * * It is unreasonable searches that are prohibited by the 4th Amendment (Citing cases). We are not here confronted with the arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. The automobile here searched without a search warrant was not in movement and was not occupied by the defendant at the time of the search or at the time of his arrest. In fact, government agents had made it impossible for him to drive it away. Under these circumstances the search of his automobile was unreasonable." (U.S. v. Stoffey, supra, 928-29).

Clearly, then, Exhibit E was obtained in violation of the defendant's rights under the 4th Amendment of the United States Constitution. It should not have been received in evidence. Objection was raised to its admission by motion to suppress, made before trial (Tr. 4-14), and renewed upon its admission (Tr. 245). Without it, the jury would not have convicted the defendant on Count II of the indictment. The conviction should be reversed and a new trial granted.

III. THE COURT ERRED IN ADMITTING EXHIBIT D INTO EVIDENCE, THERE BEING NO EVIDENCE OFFERED TO LINK THE ITEMS TO THE DEFENDANT OR TO THE CRIME CHARGED: UNDER THE CIRCUMSTANCES OF THIS CASE, THE SUBSEQUENT WITHDRAWAL OF THIS EVIDENCE FROM THE JURY DID NOT CURE THIS ERROR.

In the course of the trial, Government's Exhibit D was

admitted into evidence, consisting of an eye dropper and needle obtained in a search of the premises at 774 17th Street. (Tr. 87,168). Later, a witness testified as to this exhibit that "a trace of morphine or heroin was in this specimen (Tr. 167). No evidence was offered to link this exhibit with the defendant or with the crime charged. At the close of the trial the court ruled that Exhibit D be stricken and the jury was instructed to disregard any testimony concerning it. It is respectfully submitted, however, that the error in admitting this exhibit over the defendant's objection was not cured by this subsequent withdrawal.

The effect of this exhibit, and the testimony surrounding it, was naturally to convince the jury of the defendant's knowledge of some sort of illegal narcotics activity being carried on, on the premises of 774 17th Street. They may well have reasoned from this that the defendant was in some sort of joint or constructive possession of the narcotics. From the instructions given them, it then followed that concealment had been made out if the defendant did not take some affirmative act of disclosure. The only other evidence of the presence of narcotics on the premises at 774 17th Street was the highly suspect testimony of Geary, yet by exposure to this exhibit, the jury was indelibly impressed with the apparent presence of narcotics on the premises. Under such circumstances, only a new trial before a new jury can correct the

error. Throckmorton v. Holt, 180 U.S. 552 (1901); Helton v. U.S., 221 F2d 338 (5th Cir. 1955). The conviction should be reversed and a new trial granted.

IV. CERTAIN INSTRUCTIONS GIVEN BY THE COURT WERE SO FAR UNRELATED TO THE ISSUES AND THE EVIDENCE OF THIS CASE AS TO CONFUSE AND MISLEAD THE JURY. WHEN CONSIDERED COLLECTIVELY, THESE ERRONEOUS INSTRUCTIONS INVITED A CONVICTION ON EVIDENCE WHICH WAS NOT SUFFICIENT IN LAW TO CONSTITUTE A CRIME UNDER TITLE 21, SEC. 174.

It is submitted that the giving of Instructions 9, 10, 12, and 13 by the Court, under the circumstances of this case, was prejudicial error. The instructions read to the jury were as follows:

Instruction No. 9:

"Although the verb 'conceal' ordinarily means to hide or keep from sight or view, the expression as used in the statute and the indictment here carries a broader meaning.

"The law imposes an internal revenue tax upon all legitimate narcotic drugs, and provides that revenue stamps evidencing payment of the tax 'shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof'. It is unlawful 'for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs . . . (is) prima facie evidence of a violation of (law) by the person in whose possession the same may be found', unless the person possessing the narcotic drugs has obtained them from a registered dealer, such as a pharmacist, upon prescription issued for legitimate medical uses by a physician or other registered and licensed person.

"Since the law imposes upon every person possessing a narcotic drug (other than upon legitimate medical prescription) the affirmative duty to keep

the narcotic drug in a container bearing revenue stamps evidencing payment of the tax, the wilful failure of a person who is in actual or constructive possession of any untaxed narcotic drug (other than upon legitimate medical prescription) to reveal to some Internal Revenue official the existence of such narcotic drug, amounts to a concealment within the meaning of the statute, even though such narcotic drug may not actually be hidden or kept from sight or view."

Instruction No. 10:

"The law recognizes two kinds of possession; actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

"A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

"The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

"If you find from the evidence beyond a reasonable doubt that the accused, either alone or jointly with others, had actual or constructive possession of the heroin described in the indictment, then you may find that such heroin was in the possession of the accused within the meaning of the word 'possession' as used in these instructions."

Instruction No. 12:

"In every crime there must exist a union or joint operation of act and intent.

"The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

"With respect to lesser offenses, if it be shown that a person has knowingly committed an act denounced by law as a crime, intent may be presumed

from the voluntary doing of the forbidden act.

"But with respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction.

"Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

"A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent. (Emphasis supplied).

"An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason."

Instruction No. 13:

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

Instruction No. 10, given by the court, was error, in that it went beyond the evidence presented to the jury. It

covered both joint and constructive possession. There is no evidence of anything but actual and sole possession of narcotics by the defendant. The prejudicial nature of this instruction, its tendency to mislead the jury, can be shown when it is discussed in the context of Instructions 9, 12, and 13, also erroneous and prejudicial.

Instruction No. 9 covered a failure to report to an Internal Revenue official the possession of narcotics in the absence of an appropriate tax paid stamp. Such a situation was far afield from anything contained in the evidence of this case. Here there was no question of any failure to report to an agent of Internal Revenue, nor was there any evidence whatever in the testimony of the informant concerning the presence or absence of tax stamps or a prescription. There was no direct evidence at all as to any prescription from a physician, or the absence thereof, or as to any tax stamps. The defendant denied ever having any narcotics whatever. Nevertheless, under the terms of this instruction, the jury was told that such activities might constitute a "con cealment" of a narcotic drug. Since this was the very crime contained and alleged in Count II of the indictment, it might well be that the jury attempted to read some such factual situation into the evidence.

Instruction No. 12, dealt with the criminal intent. Though there was no issue as to intent, and if the testimony offered by the government was believed, intent was apparent,

the court went into necessary detail. A particularly misleading section is the following:

> "A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent. (Instruction No. 12. Emphasis supplied).

Similarly, Instruction No. 13, discussed aspects of the law of intent not at issue, if the testimony offered by the government was believed. Particularly misleading is the section which reads as follows:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.
>
> "In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which made a determination of the state of mind." (Instruction No. 13, emphasis supplied).

Considering all these instructions together, it is clear that the jury was led to believe that the government had made out their charge under Count II of the indictment, independent of the testimony of the informant. Count II charged the defendant with knowingly concealing and facilitating the transportation of narcotics. If the jury believed that the defendant had knowledge of the presence of narcotics, either on the premises or in the possession of someone with whom testimony had associated him, the jury

might have thought he was in some sort of joint or constructive possession of it and therefore under a duty to disclose the fact of its presence to a tax official. Since no such disclosure was asserted, the jury might have reasoned a concealment was made out, intentionally and in disregard of the law. Or again, the defendant admitted transporting the government informant to the point at which she was arrested, and found to be in possession of narcotics. The jury may well have reasoned that if the defendant knew of this, the charge of facilitation of transportation was made out.

The trouble with either of these interpretations of the evidence is that neither of them, independent of the government informant's testimony, makes out a prima facie case against the defendant. There is no evidence of "possession", within the meaning of 21 USC, Sec. 174, except that resting upon the credibility of the informant's testimony. Yet the government has relied upon the statutory presumption arising from 21 USC, Sec. 174, for it has offered no evidence either of illegal importation of the narcotics in evidence, or of defendant's knowledge of such illegal importation. The instruction permitted, in fact, invited, a conviction on Court II upon evidence which does not constitute a prima facie case under 21 USC, Sec. 174. Arellanes v. U.S., 302 F2d 603, 606-7 (9th Cir. 1962); Hernandez v. U.S., 300 F2d 114 (9th Cir. 1962). Cf. Gonzales v. U.S., 301 F2d 31 (9th Cir. 1962).

The effect of these instructions is emphasized by the fact that although a conviction was returned on Count II, the jury could reach no verdict on Count I. All of informant's testimony related to the sale or facilitation of sale alleged in Count I. As a matter of strict logic, the failure to reach a verdict on Count I negatives the fact of the defendant's possession. Conceding the law to be that inconsistent verdicts on various counts of an indictment is not reversible error, it is submitted that this is not a rule to be applied blindly. See eg. U.S. v. Maybury, 274 F2d 899 (2nd Cir., 1960). Here, it appears the court has permitted a conviction, notwithstanding the jury's disbelief of the witness upon whom the government's prima facie case rests.

The chief purpose of instruction to the jury is to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved. Bird v. U.S., 180 U.S. 356 (1901). Certainly, instructions to the jury should not tend to mislead them and an instruction is erroneous which is misleading or well-calculated to mislead, or which will tend to confuse the jury in the consideration of the issues in the case. One of the most obvious situations tending to mislead a jury, is to give them an instruction not based upon competent evidence in the case, or where the instruction implies the existence of facts of which there is no evidence or which have not been proved. The giving of the instructions discussed above was

prejudicial error. Exception was taken to the giving of each of them. The defendant is entitled to a trial to a jury properly instructed. The conviction should be set aside and a new trial granted to the defendant. Quercia v. U.S., 289 U.S. 466, 470 (1932); U. S. v. Breitling, 61 US. 252 (1858).

V. THE COURT ERRED IN GIVING ITS INSTRUCTION RESPECTING THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY. THE TENDENCY OF THE INSTRUCTION TO SINGLE OUT AND DISCREDIT THIS TESTIMONY EXCEEDED THE BOUNDARIES OF FAIR COMMENT ON THE EVIDENCE PROPERLY WITHIN THE PROVINCE OF THE TRIAL JUDGE.

It is submitted that the giving of Instruction No. 21 by the court, under the circumstances of this case, was prejudicial error. Instruction No. 21 read as follows:

> "The law makes the defendant in a criminal action a competent witness. In determining his credibility, you have a right to take into consideration the fact that he is the defendant and is interested in the outcome of this trial. This interest is of a character possessed by no other witness and is therefore a matter which may affect the weight and credit to be given his testimony, and one which may be considered by you in determining what weight you will give his testimony in connection with all the other evidence."

Under some circumstances, the giving of Instruction 21 might not be error. However, in a close case, such as the present one, where the guilt or innocence of the defendant hung in the balance on the question of whether or not the jury believed the testimony of the witness Geary, or the testimony of the defendant, it is respectfully submitted that the giving of this instruction was error. The instruction singles out the testimony of the defendant, distinguishes it from the testimony of all other witnesses, and in effect, invites the jury to disregard it. It is a bad instruction and should not have been given.

In Hicks v. United States, 150 US 442 (1893), the trial court had given an instruction concerning the testimony of

the accused as follows:

> "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you are to consider it in the light of the other evidence, in the light of the other facts . . .. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement . . . Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence." (p. 450-1).

The Court in Hicks, in the course of granting a new trial, said:

> "It is not easy to say what effect this instruction had upon the jury. If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of an accused person. Still it must be remembered that men may testify truthfully although their lives hang in the balance, and the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose slightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defected by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law." (p. 452; emphasis is the Court's).

Certainly, it must be admitted that there are many cases holding that the giving of such an instruction as was given in the present case is not reversible error. However,

in many cases the giving of such an instruction is not viewed with particular approval, and it is respectfully submitted that the giving of such an instruction, under the circumstances of this case, where the decision of the jury rested almost completely on the testimony of the two adverse witnesses, was in fact erroneous. Quercia v. U.S., 289 U.S. 466 (1932).

VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF PLAINTIFF'S CASE, AND RENEWED AT THE CLOSE OF ALL THE EVIDENCE. A REVIEW OF THE EVIDENCE REVEALS THAT A PROPER EVALUATION OF THE EVIDENCE ESTABLISHES ITS INADEQUACY TO FORECLOSE A REASONABLE DOUBT OF DEFENDANT'S GUILT, AND THE QUESTION SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

Aside from the very serious problems raised by the searches and seizures of evidence, discussed above, the evidence as a whole left so many unfilled gaps as to have justified the court in granting the motion for judgment of acquittal made by the defendant.

The testimony of Hazel Geary could only be characterized as unreliable in the extreme. Geary had previously been convicted of grand larceny, and at the time of trial was at liberty on bond on two other felony charges, forgery and possession of narcotics. She was an admitted narcotics addict and life-long prostitute. Aside from matters of impeachment, her testimony contained a number of discrepancies and improbabilities. The case against the appellant, with the exception of the testimony of Geary, was wholly circumstantial. Briefly put, the government sought to establish the guilt of Burge by proving that (1) Geary was "clean" of narcotics when she went to the Wright house in the morning, bearing marked money; (2) at the house, Geary had access to Burge; (3) after leaving the house, Geary was found with narcotics which she claimed she got from Burge; and (4) the marked money was found several days later concealed about

Burge's automobile.

None of the links in this chain of circumstances, however, remains intact when all the evidence is examined. Geary stopped at the Model Cafe for ten or fifteen minutes after she left the police station, before going to the Wright house, and was unobserved during this period. At the Wright house, she had access to Dolores Jean Wright, Jackie Bell, and an unknown cab driver, as well as appellant. Bell had the reputation of being a narcotics pusher, and Wright was a user.

The bottle of heroin which she described as being used by Burge to measure out narcotics at the house was never found, although the police had the house surrounded at all times. It was not in Burge's possession, nor in his vehicle, nor was it in the house. Who removed it from the house, and who brought it there?

The marked money was eventually found, as noted above, behind the right headlight of Burge's automobile. It was discovered as a result of an annonymoustelephone tip to Special Agent Carpenter at a time when Burge was in custody. Whoever made that phone call was rather obviously the person who placed the money behind the headlight, and it could not have been the appellant. No trace of narcotics was ever found on Burge or in his possession, and the same was true as to the marked money. Burge, a long-time Alaska teamster, was the only one of the sordid cast of this proceedings who had no criminal background and no previous connection

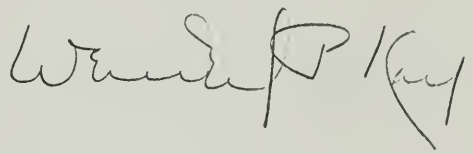
with narcotics in any way. Under all of the circumstances, the court erred in refusing to grant the defendant's motion for acquittal.

CONCLUSION

The items of physical evidence constituting the exhibits discussed in this brief were products of unlawful searches and seizures and should never have been admitted against the appellant. The chain of circumstances was incomplete. The court erred in each particular specified in this brief, and the judgment should be reversed.

Respectfully submitted,

KAY AND MILLER
Attorneys for Appellant

By: 

APPENDIX OF EXHIBITS

PLAINTIFF'S EXHIBITS

	Identified	Offered	Admitted	Rejected
A	83	163	163	
B	83	165	165	
C	83	166	166	
D	83	167	168	326-7
E	83	237	238	
F	173	177	177	

DEFENDANT'S EXHIBITS

1	187	187	187	

CERTIFICATE

I certify that, in connection with the preparation f this brief, I have examined Rules 18 and 19 of the nited States Court of Appeals for the Ninth Circuit, nd that, in my opinion, the foregoing brief is in full ompliance with those rules.

KAY AND MILLER
Attorneys for Appellant

By: William P. Kay

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 18801

On Appeal from the District Court for the
District of Alaska at Fairbanks

BRIEF FOR APPELLEE

- - - - - - -

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ATTORNEYS FOR APPELLEE

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BRIEF FOR APPELLEE

- - - - -

JURISDICTIONAL STATEMENT

On November 4, 1960, appellant was idicted by a Grand Jury and said indictment was filed in the Federal District Court for the District of Alaska (record 1). Appellant was charged in two counts with violation of 21 U.S.C. 174. He was tried and found innocent on the first count. Appellant was found guilty of the second count and a judgement and committment was entered March 25, 1963 (Record 104). Appellant filed his notice of appeal pursuant to Rule 37, F.R. Crim. P. as authorized by 28 U.S.C. 1291, 1924 (Record 104).

APPELLEE'S STATEMENT OF FACTS

Appellee is in general agreement with the facts as stated by appellant,

though not with some interpretations contained therein. Nonetheless, details of some of the transactions described in appellant's Statement of Facts must be added.

The principal factual question with which this Court is presented involves the search by police officers of the dwelling of Mrs. Dolores Jean Wright (Appellant's Brief 13). When the Government offered its Exhibits C and D, counsel for appellant for the first time objected to these on the ground that they were seized in an illegal search of Mrs. Wright's dwelling (tr. 86). The Judge, in his discrection, heard evidence as to the search and found the search proper (Tr. 128). The Court again considered the question of the legality of this search on motion for judgement of acquittal and, in ruling in favor of the Government on this point, filed its Memorandum Opinion which is part of the Record herein (Record 85 - 96).

The evidence before the trial court with respect to the search of Mrs. Wright's dwelling and admissibility of Exhibits C and D which were seized in that search was as follows:

Appellant and the police informant, Hazel Geary, were arrested in the Idle Hour Cafe in Fairbanks at approximately 7:30 P.M., April 23, 1959 (Tr. 104, 106). Mrs. Dolores Jean Wright was arrested at approximately 8:30 P.M. (Tr. 110 to 111) and was brought to the Federal Building in Fairbanks (Tr. 112).

At approximately 9:45 police officers interviewed Mrs. Wright in the deputy's room of the Federal Building (Tr. 104, 106 to 107, 109). Present

were Officer McQueen, Deputy United States Marshal McRoberts, Assistant United States Attorney Yeager, and Mrs. Wright (Tr. 103 to 104, 107). Mrs. Wright was "asked for permission to conduct a search of her home on 17th Street". (Tr. 103). Officer McQueen testified "She gave verbal permission and we asked if she would sign a waiver of search for us and she said 'you don't need that, you've got my permission.'" (Tr. 103). He further testified that Mrs. Wright appeared to consider the matter a serious one, not a joke (Tr. 103). Deputy McRoberts likewise testified "The verbal permission was given at approximately ten o'clock." (Tr. 110, See also Tr. 113).

While the trial judge declined to belive Mrs. Wright's testimony with respect to whether or not consent for a search was verbally given (Record 88), it is perhaps worthy of note that in the last analysis her testimony was that she did not recall consenting to a search of her dwelling on April 23, 1959 (Tr. 97).

Officer Calhoon, who was in actual charge of the case (although under the supervision of Captain Trafton), was informed by radio at 10:30 P.M. that Mrs Wright had given verbal consent to search (Tr. 116) and the search was instituted at 10:05 P.M. (Tr. 116 to 117). Officers Barkley and McQueen likewise testified that Mrs. Wright's dwelling was searched only after she had verbally consented to a search (Tr. 90, 106, 119). Mrs. Wright further affirmed her consent, though again verbally, after the search at approximately 11 P.M. (Tr 116

It is admitted that the police acted solely upon Mrs. Wright's consent in searching her dwelling. They had neither a search warrant nor consent from appellant (Tr. 89). However, at the time of the search no one was present

in the dwelling (Tr. 89, 132) and officers were not aware that appellant had been living in the dwelling (Tr. 91). The items seized in this search, Exhibits C and D, were found in the bathroom of the premises (Tr. 91 to 92), not in the bedroom which appellant had apparently occupied as Mrs. Wright's house guest (Tr. 98. See also Tr. 93 and 297).

There is no suggestion whatsoever in the record of the hearing on motion to suppress Exhibits C and D either in Mrs. Wright's or the officers' testimony to suggest that Mrs. Wright's consent to the search of her dwelling was induced by duress or coercion, express or implied (Tr. 93 to 101), and the trial judge so found in his Memorandum Opinion (Record 89). Perhaps the most striking evidence of the nature of Mrs. Wright's consent is the fact that it was given so readily. As indicated, Mrs. Wright was first interviewed at 9:45 (Tr. 104, 106 to 107, 109). Permission was granted by 10 P.M. (Tr. 110). No doubt much time was consumed in an attempt to convince Mrs. Wright that written consent was desirable (Tr. 103).

Appellant also questions the search of the automobile used by him in transporting Mrs. Wright, Mrs. Geary, and himself from Mrs. Wright's dwelling to the Idle Hour Cafe where he and Mrs. Geary were arrested (Tr. 4, Appellant's Brief 20).

Immediately after his arrest appellant was informed that his car was being impounded (Tr. 7). Such action was taken because the car had been used to transport narcotics (Tr. 226) which officers received from Mrs. Geary at the time of her arrest (Tr. 32, 33). With respect to such illegal

use of appellant's automobile Mrs. Geary testified at trial to having observed the preparation of the narcotics in question by appellant and her receipt of the same (Tr. 27). She further testified that she, Mrs. Wright, and appellant left Mrs. Wright's dwelling in appellant's car and that just prior to thier departure appellant said "You don't want to be out there with that stuff on you." (Tr. 30). In addition, these three persons were observed leaving Mrs. Wright's dwelling by police (Tr. 146, See also 219). On arrival at the Idle Hour Cafe Mrs. Geary called the police, told them of having the narcotics, and was thereafter arrested with appellant (Tr. 31).

Subsequent to appellant's arrest, the car was impounded and taken to Territorial Police Headquarters (Tr. 220, 235). Later, Treasury Agents placed the car in storage (Tr. 221). On April 30, some seven days after the arrest herein, officers searched the impounded car and located therein the marked money given to Mrs. Geary to purchase narcotics (Tr. 235, 236).

SUMMARY OF ARGUMENT

Appellant claims standing to question the search in which Exhibits C and D, a bottle of milk sugar, a hypodermic needle, and a medicine dropper were seized. Appellee contends that appellant lacks standing to question the search in which said exhibits were seized because he was not present at the time of search. Appellant was merely a house guest in the searched premises and as such was bound by the consent for a search given by the occupant of the premises, Mrs. Wright. Appellant also lacks standing to

question the search because he did not allege ownership or right to possession of the items seized. The former are the usual grounds necessary to establish standing to question a search. Appellant is not within the exception made where narcotics was seized in which case an allegation of possession or ownership would admit the crime.

Even if appellant does have standing to question the seizure of Exhibits C and D, he must on appeal demonstrate that the trial court was clearly erroneous in ruling that the search was founded upon validly given consent. The trial court herein found that valid oral consent for the questioned search was given, and appellant has failed to demonstrate wherein this finding was mistak

Police were not required to obtain the consent of appellant prior to searching Mrs. Wright's dwelling. An invitor may authorize a search of her premises, including those areas occupied by an invitee. Appellant was merely a house guest in Mrs. Wright's dwelling and as such was bound by the consent for a search given by Mrs. Wright.

The search of appellant's automobile was not illegal although conducted several days after the arrest of appellant. By reason of its use to transport narcotics, appellant forefeited his car to the Government. While appellant ma have standing to question the search of forfeited property, such forfeiture deprived appellant of his right of privacy as to the car and, therefore, a search without a warrant was not unreasonable.

The exclusion of Exhibit D and cautionary instruction given to the jury cured any error caused by its temporary admission. In any event,

appellant now seeks to question the admission of Exhibit D on a ground not raised at trial. Such may not be done.

Instructions 9, 10, 12, and 13 were all appropriate to this case, were in fact necessary and correct statements of the law. They are not in the least misleading when, as must be done, all of the Court's instructions to the jury are read together. Instruction 21 did not single out appellant's testimony improperly. Again, this instruction must be read with other instructions given. When this is done it is clear that appellant was fairly treated.

The verdict of guilty herein was supported by evidence. The jury obviously believed Mrs. Geary's testimony which was that appellant possessed narcotics and that appellant facilitated that transportation thereof. Not believing appellant's explanations as to the circumstances herein, they were intitled to convict appellant.

ARGUMENT

I. ADMISSION OF APPELLEE'S EXHIBITS "C" AND "D" WAS NOT ERROR.

A. STANDING OF APPELLANT TO QUESTION THE SEARCH OF MRS. WRIGHT'S DWELLING.

As pointed out in appellee's statement of the facts, appellant was a house guest (Tr. 98) in the dwelling at 774 17th Street in Fairbanks (Tr. 93). This dwelling was under the "control and possession" of Mrs. Wright

even according to her own testimony (Tr. 98, See also Tr. 132, 297). A bottle of milk sugar, an eye dropper, and a syringe needle which constituted Exhibits C and D, were taken from the bathroom of Mrs. Wright's dwelling (Tr. 91-92) and were introduced against the appellant. Neither at the hearing on motion to suppress Exhibits C and D nor at any other time did appellant assert ownership or right to possession of the items seized (Tr. 298-301).

On these facts appellant asserted that he has standing to question the legality of the search of the premises where he resided for several days while in Fairbanks in April of 1959 (Appellant's Brief, page 17). It is appellee's contention that the cases relied upon by appellant do not support this contention.

The primary and most authoritative case on this point seems to be Jones v. United States, 362 U.S. 257 (1960). The basic premise in all cases such as this is that

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960).

To have "standing" to question a search one must meet one of two criteria discussed by the United States Supreme Court: (1) right of possession or ownership in the thing seized, or (2) an interest in the searched premises. As to the first the Supreme Court held in Jones that in narcotics

cases where possession alone makes out the crime, the accused need not allege possession or ownership of the narcotics. The fact that the seized narcotics are offered as evidence against the accused supplies standing to question the search. As to the second basis for standing to question a search, the Court ruled that the presence at the time of the search of the accused as a guest in the searched premises also gave him standing.

It is readily apparent that our case is within neither of these possible bases for standing to question of search. Appellant did not assert ownership or right to possession of the items making up Exhibits C and D, nor did these exhibits consist of narcotics so as to place appellant within the exception which gives standing where the allegation of possession to establish standing to question a search would admit the crime. In short, possession of milk sugar, an eye dropper, or a syringe does not constitute a crime.

While it is true that appellant was a house guest in the searched premises, he was not present therein at the time of the search (Tr. 89, 288). Thus a search herein was in no way "directed" at appellant; and, as the Court in the Jones case pointed out as above quoted, it is inconsequential that the Government made use of evidence gathered in a search directed against someone other than appellant.

The other cases on which appellant relies are likewise distinguishable. In United States v. Jeffers, 342 U.S. 48 (1951), the accused was a guest of occupants of a hotel room which was searched. He was not present at

the time of the search. However, in this case the accused specifically claimed ownership of the narcotics which were seized from the hotel room. On this latter point the Supreme Court found that defendant had property rights in the narcotics sufficient to warrant their suppression, the search clearly having been illegal. As indicated, appellant herein made no such claim to the items which constitute Exhibits C and D.

In McDonald v. United States, 335 U.S. 451, 458 (1948), the accused was found to have standing to an objection to an illegal entry into the building in question since he was a tenant thereof. The tenant was found to have a "constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entering." Clearly our case involves no such circumstances, there having been a consent to entry and appellant having been merely a house guest of the person giving consent to the search (Tr. 103, 110, 98).

In the Contreras case, 291 F. 2d 63 (9th Cir. 1961), this Court reversed a conviction based upon narcotics seized from a car in which the defendants were passengers. This Court found that there was "standing" to question the search solely because the charge was possession of narcotics. In the Plazola case, 291 F. 2d 56, 61 (9th Cir. 1961), this Court ruled "that this arrest without a warrant was without probable cause, and was illegal, and the evidence obtained thereby was not admissible and should have been suppressed." Also, the Court ruled that the accused had standing to question the search under the rule of Jones v. United States since the narcotics

the time of the search. However, in this case the accused specifically claimed ownership of the narcotics which were seized from the hotel room. On this latter point the Supreme Court found that defendant had property rights in the narcotics sufficient to warrant their suppression, the search clearly having been illegal. As indicated, appellant herein made no such claim to the items which constitute Exhibits C and D.

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seized were introduced against the defendant. Thus both the Contreras and Plazola cases are to be distinguished from our case where no quantity of narcotics was seized in the search sought to be questioned and because appellant was not present at the time of the search (Tr. 91, 92, 89).

In support of appellee's contention that appellant has no standing to question the search in which Exhibits C and D seized, the Court is referred Ramirez v. United States, 294 F. 2d 277, (9th Cir. 1961). In this case in an opinion by District Judge Ross this Court found that the appellant had no standing to question the search of his wife's pocketbook or the seizure of money therein when said money was not claimed by the accused although admitted as evidence against him.

In the Ramirez case a narcotics agent had dealt with the accused and his wife, making purchases of narcotics with money the serial numbers of which had been recorded. At the subsequent arrest of appellant and his wife money was seen in the wife's pocketbook which both she and the accused claimed was the wife's money. Presumably the money seen in the wife's purse turned out to be Government funds used to purchase narcotics. On these facts this Court held that Ramiraz had no standing to question the the search, which was apparently conducted in his presence, although the money was admitted as evidence against him. The Court laid special emphasis upon the fact that "both appellant and his wife have asserted that the seized money belonged to the wife, not the appellant." 294 F. 2d at 281. The Court then cited numerous cases in support of the proposition which

the Supreme Court recognized as the general rule in Jones v. United States "that in order to suppress evidence the movant must at least claim he owned the seized property, that he had a proprietary or possession interest in it or that it 'belonged' to him 294 F. 2d at 281. In this case, as in that presently before this Court, the evidence sought to be suppressed was not an item the possession of which is illegal. Therefore, under the rule of the Jones case and that expressed by this Court, one must allege ownership or right to possession to have standing to seek the suppression of evidence such as Exhibits C and D herein.

As for the second ground under which standing to question a search may be made out, namely permissive or other legal presence in the searched premises, the Court is referred to the case of United States v. Coots, 196 F. Supp. 775, (D.C.E.D. Tenn. 1961). In this case the defendants were accused of illegal possession of a sawed-off rifle which they sought to suppress as evidence. The gun was seized from the home of the defendant Earl Coots. Harold Coots, a kinsman of Earl, was held not entitled to suppress the evidence, possession of which he apparently admitted. The case of Jones v. United States was distinquished since Harold was not a guest, invitee, or resident, etc., in the searched premises.

Admittedly this case is not on all fours with our case. In our case appellant had been a guest or invitee in the searched premises. However, as in the Coots case and unlike the Jones case, appellant herein was not a guest or invitee in the searched premises at the time of the search. At

best appellant expected to be permitted to return to Mrs. Wright's dwelling. Thus it appears that the search herein was really directed at Mrs. Wright, though no doubt with a purpose of gathering evidence against appellant. Nonetheless, except where possession alone of the item seized constitutes a crime, or where defendant is present in the searched premises at the time of the search, it would appear that the accused must, under the above cases, show ownership or possession rights in the item seized or the searched premises. Appellant herein has done neither.

In making the foregoing argument as to Exhibit D, appellee has not overlooked the fact that "a trace of morphine or heroin was in the specimen". (Tr. 167) The fact that we are dealing with items not themselves subject to forfeiture as contraband rather than a cache of some narcotics

distinquishes these items from the evidence seized in the Jeffers case, 342 U.S. 48 (1951). Further, we here deal with only a "trace" of narcotics which might have been either morphine or heroin. The charge herein was limited to heroin (Record 1).

Nonetheless, if a trace of some narcotics gives standing to question a search without the usual allegations as to either possession or ownership of the item or premises searched, what has been said applies to Exhibit C which contained no narcotics and Exhibit D will be further dealt with in Part III, infra.

B. EVEN IF APPELLANT MAY RAISE A QUESTION AS TO THE SEARCH OF MRS. WRIGHT'S DWELLING, HE HAS NOT DEMONSTRATED THAT THE TRIAL COURT WAS "CLEARLY ERRONEOUS" IN RULING EXHIBITS "C" AND "D" TO BE ADMISSIBLE.

In United States v. Page, 302 F. 2d 81, (9th Cir. 1962), this Court, sitting en banc to review a situation markedly similar to that herein, ruled that it would consider only the evidence which the trial judge found credible on motion to suppress, that the question of whether a search has violated the accused's constitutional rights is one of fact, that consent to a search can be validly given although the defendant is in custody, this too being a question of fact, and that "in reviewing the trial court's determination, we apply the 'clearly erroneous' rule, by analogy to Rule 52(a) F.R. Civ. P., 28 USC, as elucidated in United States v. United States Gypsom Co., 1947, 333 U.S. 346 . . .!" In amplifying the Court's earlier opinion in Channel v. United States, 285 F. 2d 217, (9th Cir.

1960), this Court reaffirmed the rule that the Government must convince the trier of fact that consent to a search was given without express or implied duress or coercion, that the consent was unequivocal and specific, given freely and intelligently, and that such must be shown by convincing evidence.

From the memorandum opinion filed by the trial court herein it is immediately apparent that it decided the question of legality of the search herein under the test set out in the Channel and Page cases (Record 88-89). In this memorandum opinion the trial court reviewed in some detail its appraisal of the motives, demeanor, etc., of the five witnesses who testified on motion to suppress Exhibits C and D. The Court had concluded that the testimony of Mrs. Wright was not worthy of belief. From the credible evidence before it the Court found that Mrs. Wright was not coerced, that she was specifically asked for permission to search, that she "fairly, intelligently, unequivocally and specifically" gave such consent within fifteen minutes after her arrival at the Federal Jail (Record 88). The Court further found that no search had been conducted prior to the giving of consent for a search (Record 89). In addition, the Court noted that nothing in Mrs. Wright's testimony suggested "that the verbal consent given by her was induced or prompted by any duress or coercion, actual or implied, real or imaginary." (Record 89).

The foregoing findings by the trial court appear to be amply borne out in the transcript herein as set forth in appellant's statement of the

facts. Appellant has totally failed to show wherein the trial court committed clear error--wherein "a mistake has been committed, United States v United States Gypsum Co., 333 U.S. 364, 395, (1947), in finding that Mrs. Wright, although under arrest, validly consented to search of her dwelling. If Mrs. Wright was intimidated as appellant claims she would undoubtedly have signed the written consent which police sought. (Tr 103).

C. CONSENT OF APPELLANT TO SEARCH OF MRS. WRIGHT'S DWELLING IS NOT REQUIRED.

As appellant points out, it is admitted that officers did not ask for appellant's consent before searching Mrs. Wright's dwelling and that they did not have a search warrant (Tr. 89). It should, however, be noted that Mrs. Wright testified that she was in possession and control of the dwelling in question (Tr. 98) and that police officers did not know that appellant had occupied a room in Mrs. Wright's dwelling (Tr. 91). Appellant was merely a house guest of Mrs. Wright (Tr. 98). However, neither he nor anyone else was in the dwelling in question when it was entered pursuant to Mrs. Wright's consent to a search (Tr. 89, 132).

Appellant's contention that his consent to a search of Mrs. Wright's dwelling was necessary is not borne out by the cases cited by him. In Chapman v. United States, 365 U.S. 610 (1961), a forced entry and search on the say-so of the landlord of the searched premises was struck down. The tenant of the dwelling was not present and had not been

consulted. These facts differ considerably from our case where entry was gained with the consent of the person immediately entitled to control and possession of the entire house which was subjected to search. Unlike the Chapman case appellant herein was not the person entitled to exclusive possession of the premises. Unlike the landlord in the Chapman case Mrs. Wright, who consented to the search, was entitled to immediate and exclusive possession of the premises. The cases of Cola v. United States, 22 F. 2d 742 (9th Cir. 1927), and Klee v. United States, 53 F. 2d 58 (9th Cir. 1931), are distinguishable from our case in the same fashion as the Chapman case, as also may be the case of United States v. Blok, 188 F. 2d 1019 (D.C. Cir. 1951). In all of the latter cases the person entitled to exclusive possession of the searched premises had not consented to the search conducted in their absence without a warrant. Hanzel v. United States, 296 F. 2d 650 (5th Cir. 1961), involves the right of the sole owner of a corporation to object to the seizure of corporate records. Here again consent of no one entitled to use or possession of the searched premises was obtained prior to the search. In our case Mrs. Wright was consulted and did consent to the search of her dwelling (Tr. 103, 110).

While it is true that Stein v. United States, 166 F. 2d 851 (9th Cir.)cert denied, 334 U.S. 844 (1948) and United States v. Sferas, 210 F. 2d 69 (7th Cir.) cert. denied 347 U.S. 935 (1954) are distinguishable on their exact facts from the instant case, they embody a general principle which

fits the facts herein. These cases, unlike those relied upon by appellant, embody the factor of consent by one having a right to immediate and exclusive possession of the searched premises.

In the Stein case the person consenting to a challenged search was the wife of the accused who with his wife had joint ownership and control of the searched premises. This Court held that the evidence seized was admissible against the accused, the entry and search by officers having been properly authorized by the wife. Certainly if a wife can consent to a search of a joint premises, an invitor, such as Mrs. Wright, can consent to a search of her premises as against an invitee such as appellant. The Sferas case involved consent by one of two business partners to a search and seizure. The Court held that consent by one partner was sufficient, Again, if one partner can consent to a search of partnership property, an invitor can consent to a search of his permises, including areas to which an invitee has access.

A search of premises occupied by a house guest has been upheld in Fredrickson v. United States, 266 F. 2d 463 (D.C. Cir. 1959), and Woodward v. United States, 254 F. 2d 312 (D.C. Cir), cert. denied 357 U.S. 930 (1958). In these cases consent was given by the owner or possessor of searched premises. See Cutting v. United States, 169 F. 2d 951, 12 Alaska 143 (9th Cir. 1948). Also instructive is the case of United States v. Eldridge, 302 F. 2d 463 (4th Cir. 1962). While this case affirms the search of a car consented to by the bailee of the car

under the challenge of the bailor (somewhat the reverse of our situation where the one ultimately entitled to possession gave the consent). it points up the distinction between cases such as those on which appellee relies and the case of Chapman v. United States, 365 U.S. 610 (1961), on which appellant relies. Also, the Court in the Eldridge case emphasizes the fact that the ultimate test here is whether or not the search was a reasonable one. If a bailee's consent to a search is reasonable, how much more so is that consent given by one entitled to exclusive possession of a dwelling as against a mere house guest.

II. SEARCH OF A FOREFEITED AUTOMOBILE IS NOT UNREASONABLE SO AS TO RENDER MONEY FOUND THEREIN INADMISSIBLE. APPELLANT HAS NOT BEEN PREJUDICED THEREBY IN ANY EVENT.

It is clear that the search in question was made several days after the car was seized by reason of its having been forfeited (Tr. 10, 13, 235.) Appellant does not question the forfeiture of his car by reason of its having been used in transporting narcotics but rather he objects that no search warrant was obtained prior to the search of the previously forfeited car (Appellant's Brief 20, et seg.).

Presumably appellant bases his standing to question this search on the lanquage of United States v. Jeffers, 342 U.S. 48 (1951). In that case the United States Supreme Court ruled that one could have standing to question a search although he had no property in the thing seized which was later introduced as evidence against him. It must be remembered,

however, that standing to question a search and whether the search conducted was reasonable are two different considerations. The Jeffers case so treated these questions.

In attempting to establish the invalidity of the search herein appellant cites three cases. In the Rent case, 209, F 2d 893 (5th Cir. 1954), the car in question was not seized for having transported contraband but for the purpose of searching it. The car was not seized for forfeiture until after the search which turned up marijuana in the car.

Our case is quite different. Officers told appellant that his car was being impounded (Tr. 7). It was impounded "because it had been used in the sale and possession of narcotics" (Tr. 226). The basis for the forfeiture was, of course, officers receipt of narcotics from Mrs. Geary after her arrest (Tr. 32, 33), which narcotics had been received from appellant (Tr. 27) who then used the car in question to transport Mrs. Geary with narcotics from Mrs. Wright's dwelling on 17th Street to the Idle Hour Cafe where she and appellant were arrested (Tr. 30 to 31). Just prior to the arrest, officers had observed appellant, Mrs. Wright and Mrs. Geary leave Mrs. Wright's dwelling, get into appellant's car, drive to a beauty parlor where Mrs. Wright got out, and then drive to the Idle Hour Cafe where the arrest was made (Tr. 146). Based on the foregoing, and in particular on the testimony of Mrs. Geary, the car in question was forfeited by appellant at the time of its use for transportation of illegal narcotics, although the seizure for such illegal use

took place somewhat later. 49 U.S.C. 781, 782, 787 (d), United States v. One 1951 Oldsmobile Sedan, 129 F. Supp. 321 (D.C. E.D. Penn. 1955). Thus, at the time that the car in question was searched, appellant had no property in it. While as indicated in United States v. Jeffers, 342 U.S. 48 (1951), the loss of property may not remove the former owner's standing to question a search, it is difficult to see how a search of the property forfeited could be unreasonable. Unlike the Jeffers case there is no illegal entry or use of evidence obtained through an illegal entry in our case. It is, of course, only unreasonable searches that are prohibited. United States v. Rabinowitz, 339 U.S. 56, 60, 70 (1950).

In neither of the other cases relied upon by appellant does it appear that the car in question had been forfeited before the search. In the Stoffey case, 279 F. 2d 924 (7th Cir. 1960), officers, though armed with search warrants as to the accused and the building, had no search warrant for the accused's car which was searched and from which evidence of illegal gambling was taken. The car had not been forfeited prior to the search and apparently was not subject to forfeiture so that the accused retained his full right of privacy as to the car which appellant herein had already lost by reason of his having used the car to transport narcotics. (Tr. 30)

Nonetheless, if appellant's car was illegally searched, the fruits thereof bore no relationship to appellant's guilt of Count II of the indictment herein. Count II dealt only with concealment and facilitation of the transportation of narcotics (Record 1). The money found in appellant's

car after its forfeiture was pertinent only to the sale of narcotics. As to this charge appellant was acquitted (Record 104). Appellant does not suggest, as indeed he probably could not, wherein the admission of the money relative to Count I was prejudicial to him as to Count II.

III EXHIBIT "D" WAS NOT OBJECTED TO ON THE GROUND NOW RAISED AND WAS NOT PREJUDICIAL TO APPEALLANT.

The Government's Exhibit D was admitted into evidence over the objection of the defendant's counsel (Tr. 168). Counsel's objection was merely "The same objection, Your Honor," "Tr. 168), which appears to refer to counsel's objection to all the Government's exhibits, including Exhibit A where counsel objected as follows:

> I object at this time, Your Honor. I don't think the chain is quite complete yet. Maybe I am incorrect in that regard. It appears to be complete from Lt. Trafton to this witness and from this witness back to the office, but I am not quite satisfied that it has been completely covered yet.

Counsel for the Government replied:

> I recall the testimony of Officer Barkley that he recieved the Identification from the Bureau in the course of Business. I can call Officer Barkley back, or Lt. Trafton. (Tr. 163)

Thereafter the Court agreed with the United States Attorney that the evidence had been accounted for at all times between its seizure and the trial, and appellant's objection was overruled (Tr. 163). Appellant made no objection on the ground now asserted, namely, "No evidence was offered to link this exhibit with the defendant or with the crime charged," (Appellant's Brief 23). Appellant may not rely upon an

objection not presented to the trial court. Hilliard v. United States, 121 F. 2d 992, 995-96 (4th Cir.), cert. denied 314 U.S. 627 (1941); Rule 51, F.R. Crim. P.

Nonetheless, Exhibit D was later excluded and the jury instructed to disregard any testimony concerning it (Tr. 326, 327). The very cases upon which appellant relies are ample authority for the proposition "that, as a general rule, evidence which is withdrawn from the consideration of the jury by the direction of the trial judge may not serve as a basis for reversible error, that the direction of exclusion by the court cures any error which may have been committed in its introduction." Helton v. United States, 221 F. 2d 338, 340-341 (5th Cir. 1955): Throckmorton v. Holt, 180 U.S. 552, (1901).

In the Helton case the conviction was reversed because the appellate court was convinced that no instruction could remove the effect of a statement attribued to the accused by a witness to the effect that the accused had been smoking marijuana for four or five years. Acquisition and production of marijuana being the charge. The trial court had stricken the statement from the record but apparently gave no cautionary instruction. The testimony, of course, had no bearing on the offense charged and was in the nature of an admission by the defendant. The Throckmorton case is likewise distinquishable from our case due to the nature of the evidence temporarily admitted and deficiencies in the technique by which the trial court accomplished the removal of improper

evidence.

The eye dropper and hypodermic needle admitted and later stricken in our case with cautionary instruction are clearly not in the same class as the evidence stricken from the Helton case. Exhibit D was relevant to the charge herein but may, in fact, have been stricken on the ground on which appellant now relies, namely failure to show a connection between the items in Exhibit D and the accused. That this temporary admission as evidence suggested appellant's knowledge of some illegal narcotics activity may be true; but as to this, the excluded evidence suggested activity no different than that testified to in great detail by Mrs. Geary, which testimony the jury obviously believed.

In short, the Court's exclusion and instruction gave appellant exactly what he sought, and the evidence temporarily admitted was not of the inflammatory character of that in the Helton case. Gregory v. United States, 253 F. 2d 104, 110 (5th Cir. 1958).

IV. INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE NOT UNRELATED TO THE ISSUES OR EVIDENCE, NOR WERE THEY CONFUSING.

A. INSTRUCTION 9.

Appellant's exception to Instruction 9 was noted and is question as being beyond the evidence herein. (Appellant's Brief, 27). As indicated in the trial court's Memorandum Opinion (Record 91) this instruction was taken verbatum from Instruction 24.07, Jury Instructions and Forms, 27 F.R.D. 39, 167.

As for the instruction being beyond the evidence herein, Mrs. Geary testified that the heroin which appellant had in his possession was in an "ordinary" white jar like that comprizing Exhibit C which contained milk sugar (Tr. 27). The heroin which appellant removed from one white jar and which was given by him to Mrs. Geary was likewise placed in an unstamped container (Tr. 27).

There seem to be few, if any, cases in point on the definition of concealment as used in 21 U.S.C. 174. However, the case of United States v. One Cadillac Automobile, 2 F. 2d 886 (D.C. W.D. Tenn. 1924), suggests that dealing with unstamped narcotics in a car amounts to concealment. The trial court in Instruction 9 charged that dealing in unstamped narcotics amounted to a concealment. Roviaro v. United States, 353 U.S. 53, 63, (1957), suggests the strong relevancy between possession and concealment in cases such as this. Hence, the necessity of an instruction narcotics tax stamp law, 26 U.S.C. 4704 (a).

B. INSTRUCTION 10.

Instruction 10 is likewise challenged as being beyond the evidence herein. This instruction was also taken verbatum from Instruction 24.09, Jury Instructions and Forms, 27 F.R.D. 39, 169, This instruction was expressly approved in Arellanes v. United States, 302 F. 2d 603, 608 (9th Cir.) cert. denied 371 U.S. 930 (1962).

As for the applicability of this instruction under the facts of the case, appellant himself elicited much testimony as to the presence of persons

other than appellant at the dwelling of Mrs. Wright on the afternoon in question (Tr. 139-140, 143). In particular, the finger of suspicion was pointed at appellant's friend and business associate in whose company appellant was much of the afternoon of April 23, 1959 (Tr. 139-140, 144). The former was a known dope peddler (Tr. 50). Finally, from Mrs. Geary's testimony it seems possible that the narcotics were in fact stored in Mrs. Wright's basement (Tr. 26). See Arellanes v. United States, 302 F. 2d at 606, wherein this Court discussed the effect of a person's presence or control over premises where narcotics are found. On the foregoing facts, detailed instructions as to what constituted possession of narcotics by the appellant were clearly in order. The relationship and importance of a finding of actual or constructive possession of narcotics to a charge such as that herein was set forth in the immediately preceeding portion of this brief.

C. INSTRUCTIONS 12 AND 13.

Rather surprisingly, appellant argues that the instructions given on intent and what evidence constitutes a showing of intent were inappropriate because "there was no issue as to intent, and if the testimony offered by the Government was believed, intent was apparent." (Appellant's Brief, page 27). By the very words of the statute under which defendant was charged, it is apparent that knowledge (intent) is an essential element of the crime charged which the Government must prove. 21 U.S.C. 174. In Griego v. United States, 298 F. 2d 845, 848 (10th Cir. 1962), the

elements of this offense are set forth and include "(3) The defendant's knowledge of such unlawful importation." But moreover general criminal intent is required and as to this an instruction such as that here questioned must be given. Shafer v. United States, 179 F 2d 929 (9th Cir) cert. denied, 339 U.S. 979 (1950).

Instructions 12 and 13 were taken from Instructions 4.01, 4.02, 4.03 and 4.06, Jury Instructions and Forms, 27 F.R.D. 39 (75-79). Each of the latter instructions is supported by voluminous authorities cited therein.

Finally, as appears in the trial court's Memorandum of Opinion, (Record 93-94), the objection leveled by appellant's counsel at instructions 9, 10, 12 and 13 was that these instructions while not wrong or erroneous, may have a tendency, because they are unnecessary, might have a tendency to mislead the jury." We submit that the instructions given were indeed not erroneous, that they were necessary, and that when considered by the jury as a whole with other instructions as required by the Court in its first instruction they were in no way misleading. As to the second portion of appellants attack on the foregoing instructions (Appellant's Brief, 28 et seq.) unless appellee misunderstands the argument, there is pointed up no error in the instructions. Appellant states that no prima facie case is made out by the Government without the testimony of Mrs. Geary (Appellant's Brief, 29). Appellant does not suggest nor does he cite any authority to show why the validity of

the instructions or strength of appellant's case herein should be considered without reference to Mrs. Geary's testimony.

If appellant's argument is that Instruction 9 in conjunction with Instruction 12 suggests that a conviction may be had herein for failure to produce tax stamps for containers used for narcotics, such argument plainly overlooks both the Court's first instruction to the jury that all instructions be considered as a whole and the law to the same effect. Stapleton v. United States, 260 F. 2d 415, 420 (9th Cir. 1958). Also overlooked is the obvious and express purpose of instruction 9; namely, the defining of "conceal" as used in 21 U.S.C. 174.

The trial court clearly instructed the jury as to the exact charge herein (Instruction 4), and statute upon which the charge is based (Instruction 5), and the effect of unexplained possession of narcotics (Instruction 6). The Court then spelled out the elements of the crime (Instruction 7). Instruction 9 then defines concealment. When all of these instructions are considered together it is clear that the jury must find proof of the three elements of the crime herein as set forth in Instruction 7 and that these must be proved by the Government beyond a reasonable doubt. It is clear also that the Court did not instruct the jury that they might convict solely on the basis of appellant's failure to have tax stamps on a narcotics container.

Appellant argues that failure to convict on Count I negates appellant's possession of narcotics (Appellant's Brief, 30). This is simply not so for

Count I suggests that the jury had a doubt as to who made the sale, but not appellant's unexplained possession, concealment, and transportation of narcotics.

V. INSTRUCTION 21 WAS NOT ERRONEOUSLY GIVEN.

Appellant objects to Instruction 21 because this is a "close case", because it singles out defendant's testimony (Appellant's Brief 32), and becau "the decision of the jury rested almost completely on the testimony of two adverse witnesses." (Appellant's Brief 34). Appellant does recognize that this instruction has had wide acceptance. In fact it was taken with but slight modification (which changed the words "should be seriously considered" to "may be considered") from Stapleton v. United States, 260 F. 2d 415, 420 (9th Cir. 1958). As indicated in that case, the instruction "follows closely the rules laid down in Reagan v. United States, 157 U.S. 301, 310 (1895).

Contrary to appellant's suggestion, he was not the only witness whose testimony was singled out for special consideration. In Instruction 22 the Court warned the jury that Mrs. Geary was an accomplice and that her testimony "is to be received with caution and weighed with great care." In addition, the Court instructed the jury generally as follows:

> All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care.

As the Court instructed in Instruction No. 1 and as this Court ruled in t Stapleton case, 260 F. 2d 415, 420 (9th Cir. 1958), instructions are not to

be singled out but must be treated as a body.

VI. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILTY ON COUNT II.

Without citation of authority or reference to the transcript appellant seeks to have this Court overturn a quilty verdict. Indeed, a verdict unsupported by substantial evidence as to the elements of the crime should not stand. Noah v. United States, 304 F. 2d 317 (9th Cir. 1962).

The elements of the crime of which appellant was convicted are: (1) concealing and ficilitating the transportation of narcotics, (2) doing so knowingly, and (3) doing so with knowledge of illegal importation. 21 U.S. C 174, Griego v. United States, 298 Fed. 845, 848 (10th Cir. 1962). As indicated previously, unexplained possession of narcotics is "deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 21 U.S. C. 174.

In this case, Mrs. Geary testified in vivid detail as to her receipt from appellant of one capsule of heroin (Tr. 20-21) and his later preparation of a quantity of heroin (Tr 26-27), delivery of it to her (Tr. 27), and transportation of her and the appellant in the latter's car to the place of arrest (Tr. 30-31). Supporting Mrs. Geary's testimony as to defendant's possession of heroin is Exhibit A, a medicine dropper, and syringe needle. Analysis of the items making up Exhibit A disclosed

traces of morphine or heroin (Tr. 161-163). Also in evidence was the pillbox into which Mrs. Geary put the heroin which she received from appellant April 23, 1959 (Tr. 164-165). Upon analysis the substance therein proved to be milk sugar, quinine, hydrochloride, and heroin hydrochloride (Tr. 164). It was Exhibit B which Mrs. Geary had in her possession while being transported by appellant and which she turned over to police upon her arrest (Tr. 30-32). Finally, Exhibit C was admitted. This was a jar of milk sugar on which was found a fingerprint of appellant (Tr. 165-166, 180).

In the face of the foregoing, appellant offered no explanation of the circumstances indicating his possession of narcotics (Tr. 270-287, 297-301). He was satisfied with attempting to raise doubt through showing the presence of other persons who might have been the true culprit, rather than showing that someone else, not he, gave Mrs. Geary the narcotics in question and that he transported them without knowing it. (tr. 50, 59, 139-140, 143, 280, 281). In this situation the jury had to chose whether to belive appellant or Mrs. Geary. The jury obviously believed Mrs. Geary and thereby found that appellant has possession of narcotics and that he had not sufficiently explained his possession of the same. Having failed to explain his possession of narcotics, appellant could be convicted of concealing and facilitating the transportation of narcotics. 21 U.S. C. 174.

CONCLUSION

The search herein conducted was validly consented to, making admission of Exhibit C proper. Exhibit E was properly seized from a previously forfeited car and was hence proper evidence, although it is irrelevant and nonprejudicial to appellant as to Count II. The Court properly instructed the jury and properly denied a motion for judgement of acquittal. Therefore, the judgement herein should be affirmed.

Dated, Anchorage, Alaska,

October_____, 1963.

Respectfully submitted,

WARREN C. COLVER
United States Attorney

By_____
H. RUSSELL HOLLAND
Assistant United States Attorney

ATTORNEYS FOR APPELEE

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN C. COLVER
United States Attorney

By _____
H. Russel Holland
Assistant United States Attorney

No. 18,801

United States Court of Appeals
For the Ninth Circuit

RICHARD W. BURGE,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

PETITION FOR REHEARING EN BANC

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No. 18,801

United States Court of Appeals

For the Ninth Circuit

RICHARD W. BURGE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING EN BANC

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 23 of this Court, Appellee herein respectfully petitions this Court for rehearing *en banc* in the above-captioned cause.

Oral argument in this matter was heard on December 12, 1963, before Chief Judge Richard H. Chambers, Circuit Judge Gilbert H. Jertberg and Senior Judge J. W. Madden, United States Court of Claims. The opinion and decision of this Court was filed on May 29, 1964, Judge Madden dissenting. Time for filing of a petition for rehearing was extended to July 29 by Judge Chambers and this petition is filed herewith within the time provided by provision of Rule 23 of this Court.

GROUNDS FOR GRANTING A REHEARING EN BANC

1. EFFECT OF THIS COURT'S DECISION.

The Court's previous decision is not an insignificant one which pertains only to this case. It will affect nation-wide law enforcement and is of such general importance as to merit review by the entire Court.

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2. THE TRUE ISSUE WAS NOT REACHED BY THE COURT.

The crucial issue in this case is not whether it is permissible to equate the landlord-tenant or the paying guest of a hotel or the lodger in a rooming house relationships to the "house guest" situation. Nor is it necessary to decide whether the express or implied permission to search given by a host of a "house guest" to those portions of the premises to which the house guest has access and uses with the express or implied permission of his host is binding on the house guest.

Appellee will assume, *arguendo,* that Appellant has standing to move to suppress Exhibits C and D, nevertheless it does not follow that this search was unreasonable. What the majority has overlooked, we respectfully submit, is that the consent of the hostess is not a waiver of her guest's constitutional rights (Cf. *Stoner v. California,* 376 U.S. 483, decided March 23, 1964). Rather, her consent is merely a lawful invitation to government agents to enter her premises and examine them just as she herself could do. Once the police officers were lawfully admitted, the only remaining question is to what extent their right to search is limited by the guest's right of privacy in his personal effects. The decisions make it plain that so

long as the search does not exceed the degree of exposure reasonably to be expected by an individual in leaving his possessions in an area subject to the sight and use of others it has been held reasonable.

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3. APPELLANT WAIVED HIS RIGHTS UNDER THE FOURTH AMENDMENT BY FAILING TO MAINTAIN PRIVACY IN HIS EFFECTS.

Even though the search may be directed at the possessions of a guest, it is reasonable so long as it does not exceed the degree to which the guest has voluntarily compromised the privacy of his possessions. Appellant waived his right to privacy in Exhibits C and D by leaving them in the only bathroom available for use by the occupants of, and visitors to, the host's apartment. Appellant may not now be heard to claim that his Fourth Amendment right of privacy in the narcotics paraphernalia was violated because law enforcement officers were among the visitors allowed in the premises by his hostess. Had he secreted them in an area reserved for her exclusive use or by locking them in a suitcase, for example, the situation would be different. Privacy connotes a degree of exclusiveness which Appellant has forfeited.

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4. THIS DECISION CONFLICTS WITH DECISIONS OF THIS COURT BOTH BEFORE AND AFTER JONES v. UNITED STATES, 362 U.S. 257 AND WITH THE MAJORITY OF CASES IN OTHER CIRCUITS.

The following decisions by this Court have upheld searches in similar situations:

Sartain v. United States, 303 F. 2d 859 (1962), cert. den., 371 U. S. 894;

Von Eichelberger v. United States, 252 F. 2d 184 (1958);

Cutting v. United States, 169 F. 2d 951 (1948);

Stein v. United States, 166 F. 2d 851 (1948), cert. den., 334 U. S. 844.

In addition to the decisions cited at pages 17 and 18 of Appellee's Brief in this case, attention is invited to *Calhoun v. United States,* 172 F. 2d 457 (C.A. 5, 1949), cert. den., 337 U. S. 938; *United States v. Rees,* 193 F. Supp. 849 (D. Md., 1961); *United States v. Sergio,* 21 F. Supp. 553 (E.D. N.Y. 1937); cf. *Holzhey v. United States,* 223 F. 2d 823.

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5. **THE COURT FAILED TO DISTINGUISH BETWEEN STANDING TO QUESTION A SEARCH AND THE REASONABLENESS OF THE SEARCH.**

A person aggrieved by a search may have *standing* to object but if the search is legal the evidence obtained as a result of the search is admissible regardless of his *standing.* The majority having determined that Appellant had such *standing,* automatically determines the search to have been illegal. But the search was legal, i.e., it was made with the consent of Dolores Jean Wright who had authority and control of the premises and could thus give valid authorization. None of the decisions cited by the majority are to the contrary.

In *Jones v. United States,* 362 U. S. 257, Jones, a guest, had sufficient *standing* but the Court didn't decide whether the search was legal. Unlike *Chap-*

man, 365 U. S. 610, where the Supreme Court held that the landlord did not have authority to consent to the search, Dolores Jean Wright did have that authority. *Jeffers,* 342 U. S. 48 parallels *Chapman,* supra. *Henzel,* 296 F. 2d 650, is inapposite for there the search was illegal. The Court's attention is also invited to fn. 18 in *Wong Sun v. United States,* 371 U. S. 471, 492 which clearly distinguishes *Jones* and *Chapman.* There, the Supreme Court held the narcotics inadmissible as to Toy but not as to Wong Sun because there was no invasion of the latter's property rights.

Dated, Anchorage, Alaska,
July 17, 1964.

Respectfully submitted,
JOSEPH J. CELLA,
United States Attorney,
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Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify, that in my judgment, this petition for rehearing is well founded, and that it is not interposed for delay.

Dated, Anchorage, Alaska,
July 17, 1964.

JOSEPH J. CELLA,
United States Attorney.

No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
Southern District of California
Honorable Harry C. Westover, Judge Presiding.

Appellants' Homer L. Woxberg, Sr., and Wayne Franklin Dykes Opening Brief.

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No. 18805

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Introductory Statement.

This is an appeal by Homer L. Woxberg, Sr., and Wayne Franklin Dykes, who were officers of Line Drivers Local No. 224, of the International Brotherhood of Teamsters Union, from convictions of embezzlement and unlawful conversion of union funds under Section 501(c) of the Labor-Managment Reporting and Disclosure Act of 1959, commonly known as the Landrum-Griffin Act. After trial by jury, appellant Woxberg was convicted of Counts I, II, IX and X of the 20 Count Indictment. [Clk. Tr. pp. 2, 3, 10 and

11.] Appellant Dykes was convicted under Counts I and II. Appellants were found "not guilty" of all of the remaining counts. [Clk. Tr. pp. 195, 196.]

For the sake of brevity, appellants have joined in presenting their respective appeals in one brief. On Counts I and II counsel have collaborated in the preparation of the Statement of Facts and Argument for and on behalf of both appellants. The Statement of Facts and Argument on Counts IX and X apply only to the appellant Woxberg and therefore as to those counts, the presentation is made by his counsel alone.

Basically, appellants contend that with respect to Count I, Section 501(c) was applied retrospectively and therefore appellants are being punished by an *ex post facto* law in violation of Article I, Section 9(3) of the Constitution. Further, that with respect to Counts I, II, IX, and X, the evidence is insufficient to sustain the verdicts. With respect to both of these points, appellants contend the District Court erred in giving and refusing certain instructions.

Statement of Jurisdiction.

1. The statutory provisions relied upon by the government to sustain jurisdiction of the District Court is Title 29, United States Code, Section 501(c). [See Counts I, II, IX and X of the Indictment, Clk. Tr. pp. 2, 3, 10 and 11.] Also Title 18, United States Code, Section 3231, and Rule 18, Rule of Criminal Procedure, sustain the jurisdiction of the District Court.

2. The statutory provisions to sustain the jurisdiction of the Court of Appeals are United States Code, Title 28, Sections 1291 and 1294.

Statement of Facts.

This case came on for trial on February 5, 1963, before the Honorable Harry C. Westover and ended March 15, 1963. The government called 15 witnesses. The defense called 12 witnesses, including testimony by each of the defendants, including appellants. The evidence covered the period from the inception of the Local Union in November of 1947 to April of 1961. The evidence will be summarized separately as to each count, and as far as is practicable chronologically.

The transcript of the evidence in this case comprises 2,856 pages. It would serve no useful purpose to synopsize all the evidence as much of the testimony bears on counts in the Indictment on which the jury returned verdicts of not guilty. The evidence synopsized hereinafter, we sincerely believe, is all the evidence necessary as a predicate to a determination of the questions raised by this appeal.

Count I (Severance Fund).

In Count I, appellants were charged with embezzling and unlawfully converting union funds in violation of Section 501(c) of the Landrum-Griffin Act. [Clk. Tr. p. 2.] This count was based on the dissolution of a trust fund, denominated and more commonly referred to as the "severance fund", established by the executive board of the Local Union as a pension plan for its paid employees. [Exs. 44 and E.]

To understand the manner in which the severance fund was created, it will be necessary to review briefly the series of events which led up to the establishment of Local 224, and the rules and regulations under which the Local conducted its business. The Local

was first established in September 1943 as a Trusteeship under the International Teamsters Union. Appellant Woxberg was appointed by the International Union as the trustee-receiver and had full authority to manage and control the affairs of the Trusteeship. [R. Tr. p. 1189, line 22, to p. 1192, line 2.] In November 1947, the Local Union graduated from its trusteeship and the management of the business and affairs of the Local were turned over to its members by the International Union. The Local, at its first general membership meeting on November 23, 1947, adopted the rules and regulations by which the affairs of the Local were to be conducted. [Ex. 43, R. Tr. p. 1204a, line 15, to p. 1206, line 25.] The minutes of the general membership meeting of November 23, 1947 reflect that the following rules and regulations were adopted:

> "Election of officers shall be conducted as provided in the International constitution, and shall be elected for the following terms of office: President, 1 year; vice-president, 1 year; recording secretary, 1 year; secretary-treasurer, 5 years; one trustee, 1 year; one trustee, 2 years; one trustee, 3 years.
>
> (2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the secretary-treasurer and the president, subject to the approval of the executive board.
>
> (3) All employees of Local No. 224 shall be employed and directed by the secretary-treasurer and president.
>
> (4) Salary and expenses of all employees shall be set and approved by the secretary-treasurer and the president, subject to the approval of he execu-

tive board. No action shall be taken by the Executive Board or the membership meetings of Local No. 224 that in any way effects policy or expenditures of money in the absence of the secretary-treasurer and president.

(5) The office of secretary-treasurer shall be the only elective paid position on the executive board of the local union.

(6) In the case of a vacancy in the executive board of the local, such vacancy shall be filled by the majority action of the executive board for the unexpired term.

(7) The executive board shall be empowered by the local union to conduct all the business of the local between regular meetings.

(8) It will take two-thirds (2/3) majority vote of entire membership to change the above rules." [Ex. 43; R. Tr. p. 1205, line 9, to p. 1206, line 16.]

It was under these regulations and authority that the severance fund was later established.

At the time the severance fund was created, the officers and members of the executive board were as follows: Appellant Woxberg was the secretary-treasurer of the Union, which in the Teamsters Union is the highest officer in the local union; appellant Dykes, president; defendants Hester and Barnes, business agents and thus paid employees of the Union and members of the executive board. [Ex. 44; R. Tr. p. 273, lines 18-23.] In addition to the paid employees there were three members on the executive board who were elected from the rank and file of the general membership. [R. Tr. p. 406, line 6, to p. 407, line 9.] Each

of the members at large had the same voting power as appellants, and the other paid employee members of the executive board. [R. Tr. p. 547, lines 1-18.]

The evidence disclosed that except for the summer months, the regular general membership meeting was held on the last Sunday of each month. These meetings usually started at about 10:00 A.M. [R. Tr. p. 1218, line 22, to p. 1219, line 6.] Before the general membership meeting, the executive board held its regular monthly meeting starting at approximately 9:00 A.M. All of the business to come before the executive board was transacted at such meetings. [R. Tr. p. 274, lines 3-9.]

The minutes of the board meetings were written in long hand and later reduced to typewritten form. Basically, these minutes consisted of resolution passed by the board concerning Union activities and thereafter these minutes were regularly read to the members in attendance at such regular meetings. Following the reading of the executive board minutes, the general membership meeting minutes of the previous regular meeting were read. [R. Tr. p. 396, line 24, to p. 397, line 24; p. 1209, line 13, to p. 1215, line 11.]

Following a reading of the minutes, the chairman always entertained a motion for approval of the minutes as read. If any question or objection was raised to anything in the minutes of either the executive board or the previous general membership meeting, this matter was held over to new business for discussion and action. [R. Tr. p. 622, line 25, to p. 624, line 6; p. 1209, line 13, to p. 1215, line 11.]

The evidence discloses without contradiction that the meetings of the general membership meeting were con-

ducted in a democratic fashion and if any member had anything that he wanted to say, he was given his opportunity to speak and to present to the general membership any matter which he wanted to be considered. [R. Tr. p. 396, line 24, to p. 399, line 18.]

After each general membership meeting, the minutes of both the executive board meeting and the general membership meeting were typed up by office personnel. They then became a part of the records of the Local and were kept in the Union office. These minutes were open for inspection by any member of the Local Union during regular office hours. [R. Tr. p. 1951, line 5, to p. 1954, line 16.]

On February 28, 1954, the executive board first adopted a resolution calling for the creation of a pension fund for the paid officers and paid employees of the Union. [Ex. 44.] This proposed pension plan applied to all four defendants (including appellants) as paid officers and members of the executive board and several other paid employees.

There was no requirement under the rules and regulations of the Local Union that the minutes of the executive board and the resolutions adopted by them be brought to the attention of the membership at any general membership meeting. Notwithstanding this fact, a reading of the executive board minutes was a regular part of each general membership meeting. Following a reading of the minutes of the executive board, the motion concerning the pension plan went over to new business. A motion was made from the floor, under new business, to approve this resolution of the executive board. After some discussion a motion was made to table the matter until the next meeting. The

objection voiced by some of the members from the floor was that before any pension plan be established for the paid Union officers and employees, a pension plan first be obtained for the general membership of the Union from their employers. [R. Tr. p. 280, line 9, to p. 282, line 8; p. 1235, line 5, to p. 1241, line 9; Ex. 44.]

The minutes of the general membership meeting of February 28, 1954 reflect that appellant Woxberg explained in detail the purpose of the proposed pension plan for the officers and employees of the Local Union. In particular it was pointed out that the moneys placed in the pension fund would be in lieu of increase in wages for the paid union employees for the next ten years, except for inflationary periods. [R. Tr. p. 1235, line 5, to p. 1236, line 7, Ex. 44.] At the next general membership meeting on March 28, 1954, a motion was made, seconded and carried to table the pension plan for the paid employees indefinitely. [Ex. 44; R. Tr. p. 282, lines 9-25; p. 1248, line 11, to p. 1249, line 29.]

Immediately thereafter, the officers of the Union began negotiations with the employers for the purpose of establishing a pension plan for the regular members of the Union, which pension plan was ultimately obtained. [R. Tr. p. 1244, line 11, to p. 1246, line 12.] On March 27, 1955, while these negotiations for a pension plan for the rank and file were still in progress, the executive board, at its regular meeting of that date, passed the following resolution:

> "After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the secretary authorizing him to have an

attorney draft the trust agreement covering severance pay for the paid officers and office manager and deposit the insurance refunds in the severance trust. Motion carried." [Ex. 44.]

At the general membership meeting of the same day, the minutes of the executive board meeting of that morning were read and approved. [R. Tr. p. 284, line 18, to p. 286, line 23; p. 1252, line 1, to p. 1253, line 25; Ex. 44.]

Prior to the executive board meeting of March 27th, appellant Woxberg as secretary-treasurer of the Union, had conferred with Richard Perkins, a lawyer, who was then a member of the firm of Bouchard and Perkins, as to whether or not such a fund could be established in accordance with the rules and regulations of Local No. 224. [R. Tr. p. 1858, line 2, to p. 1860, line 4.] Mr. Perkins advised appellant Woxberg that such a fund could be legally established. [R. Tr. p. 1833, line 24, to p. 1834, line 13.] Mr. Perkins then prepared the following "Agreement and Declaration of Trust, Severance Fund Line Drivers Local 224". This Trust Agreement, Exhibit 61, and E consisted of 8 pages and provided in part as follows:

"1. *Purpose of Trust:*

(a) The membership of Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as 'Local 224,' an unincorporated association, has by resolution duly adopted voted to make contributions to a severance fund to provide a measure of security for certain paid officers and employees of Local 224 and provide benefits for them similar to some of the benefits

available to employees of numerous private employers under pension, retirement, profit-sharing, and stock bonus plans;

(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other monies as may be designated for that purpose in future; and

(c) It is desired to establish definite and orderly procedures through the device of a trusteeship to carry out the aforesaid purpose."

In addition thereto, there were the usual provisions covering such a trust including a designation of the requirements for becoming a beneficiary under the trust. [See Ex. E; R. Tr. p. 1220, line 5, to p. 1231, line 17.] On April 1, 1955, the Trust Agreement was signed and approved by all of the then beneficiaries, defendants Hester and Barnes, the office manager, Gladys Rang and appellants Woxberg and Dykes. The latter three signed in capacity as trustees. [Ex. E.]

On April 3, 1955, at a special meeting of the executive board, the following motion was made and carried: "The secretary read the Severance Fund Trust Agreement. The motion was made and seconded the Severance Fund Trust Agreement be approved effective April 1. Motion Carried." [Ex. 44; R. Tr. p. 288, line 1, to p. 290, line 7.] While there was a special general membership meeting on April 3, 1955, the only matters that were discussed there concerned an anticipated strike. [R. Tr. p. 1258, line 4, to p. 1269, line 24; Ex. 44.]

At the next regular general membership meeting, April 24, 1955, the minutes of the executive board and

general membership meeting of March 27, 1955 were read and approved, and the minutes of the special executive board meeting of April 3, 1955 concerning the reference to the severance fund trust agreement was read and approved. No reference was made of any of these matters under the heading of new business. [Ex. 44; R. Tr. p. 1260, line 25, to p. 1264, line 6.]

The resolution adopted by the executive board on March 27, 1955, not only authorized the drafting of the Trust Agreement, but also authorized the deposit of insurance refund checks in the trust fund account. [Ex. 44.] Paragraph 1(a) of the Trust Agreement [Ex. E.], prepared pursuant to this authority, provided that the funds necessary to establish the trust were to come from certain insurance refund checks belonging to Local 224. The insurance refunds, ultimately deposited in the severance fund account, were annual rebates or refunds on the insurance premium paid by the Local Union through the Western Conference of Teamsters for a group life insurance policy. This policy covered each member of the rank and file of Local 224, as well as the rank and file members of the other local unions making up the Western Conference of Teamsters. The amount of the refund checks varied from year to year since they were based upon the experience of the entire group policy for each preceding year. [R. Tr. p. 26, line 7, to p. 27, line 3.] Because the original insurance premiums were paid from dues collected from the rank and file members, there was never any question that the insurance refund checks originally were the property of Local 224.

Beginning in 1955, the refund checks were deposited in an account at the California Bank under the name

of "Severance Fund Line Drivers Union No. 224". [Ex. 1.] The refund checks deposited in the severance fund account were as follows:

(1) Exhibit 29, Check dated March 1, 1955 in amount of $8,143.43 payable to Line Drivers Local No. 224 [R. Tr. p. 23, lines 1-10];

(2) Exhibit 30, Check dated February 23, 1956 in the amount of $7,838.02 made payable to Line Drivers Local No. 224 [R. Tr. p. 23, lines 16-25];

(3) Exhibit 31, Check dated March 7, 1957, in the amount of $8,149.40 payable to Line Drivers Local No. 224 [R. Tr. p. 24, lines 1-8];

(4) Exhibit 32, Check dated February 4, 1958, in the amount of $6,707.48 payable to Line Drivers Local No. 224. [R. Tr. p. 24, lines 9-14.]

In each instance the refund check was endorsed for deposit in the "Severance Fund, Line Drivers Union Local 224", and went directly into the severance fund account without passing through the regular Union account. [R. Tr. p. 24, line 22, to p. 25, line 7; p. 37, line 18, to p. 39, line 20.]

It is appellants' contention that the conversion, whether lawful or unlawful, occurred in point of time as each refund check was endorsed and deposited in the severance fund account thus passing title from the Union to the trustees of the severance fund. This was one of the main issues in the trial below and, as will be developed in more detail, is of particular significance in the light of the fact that the Landrum-Griffin Act did not become effective until September 14, 1959, long after the insurance refunds had been transferred from the Union to the trustees of the severance fund.

On February 23, 1958, the executive board, having received a better offer from another insurance company which would effectuate a savings to the Local Union on insurance premiums for the same coverage, voted to change the company under which the rank and file group insurance policy was held. As a result there were no further refund checks paid to the Local Union. Thereafter the severance fund continued with the funds already on deposit and no further moneys of the Union were transferred to this account. [R. Tr. p. 1265, line 18, to p. 1269, line 2.]

The funds were invested almost entirely in second trust deeds and were supervised by one Larry McBride, a man thoroughly familiar with such investments. [R. Tr. p. 113, line 22, to p. 114, line 8.] No question was raised at the trial that the severance fund was ever maintained in other than a proper manner, or that investments were improperly made. As a result, the severance fund prospered. At the time it was ultimately dissolved on November 2, 1959, and the cash and trust deeds distributed among the then beneficiaries, the fund was worth approximately $35,000.00. [R. Tr. p. 209, lines 10-24.] It is on this amount that the government based the allegation of embezzlement under Count I. [Clk. Tr. p. 2.] This, however, did not include the $5,958.00 distributed to the estate of Gladys Rang, upon her death, which was done in accordance with the terms of the trust agreement. [R. Tr. p. 208, lines 12-13.] The same formula for determining each beneficiary's interest in the severance fund when dissolved in November, 1959, was also used in determining Gladys Rang's share in the fund at the time of her death. [R. Tr. p. 167, lines 20-21.]

As previously indicated, the Landrum-Griffin Act became law on September 14, 1959. Prior to this enactment by Congress, appellants herein, as well as the members of Local 224, and other unions throughout the country were concerned with the effect of the provisions of this Act upon the activities of unions. On September 27, 1959, the executive board, at the specific instance and request of appellant Woxberg who had conferred with union lawyers concerning the Landrum-Griffin Act and its ramifications [R. Tr. p. 1289, line 7, to p. 1290, line 18], adopted the following resolution:

> "Motion made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payments to the Severance and Pension Plan Funds and car allowances to the paid employees and to distribute these monies to the employees as salary, thereby placing the responsibility of reporting to the government on the employee involved. Motion carried." [Ex. 44.]

It was explained to the general membership by appellant Woxberg that because of the requirements of the Landrum-Griffin Act, calling for the Union to report all its expenditures and other financial transactions periodically and in detail, it would be simpler to lump together as salary the car allowances and other fringe benefits, thus placing the responsibility upon the individual employees to report to the government as income these receipts on their income tax returns. [R. Tr. p. 291, line 21, to p. 294, line 15; p. 1290, line 22, to p. 1295, line 18.]

More significantly, in connection with the severance fund, the executive board was advised by appellant

Woxberg that this fund could be carried on as a private fund, thereby relieving the Union of the necessity of making such a report to the government under the Landrum-Griffin Act. [R. Tr. p. 1301, lines 2-13.] Both appellant Woxberg and Mr. Perkins, the attorney for the severance fund, testified that prior to the adoption of this resolution by the executive board, Mr. Perkins had been asked by appellant Woxberg as to whether or not it was proper to dissolve the fund and distribute the corpus of the fund in proper proportions to the beneficiaries. Each testified that Mr. Perkins advised appellant Woxberg that the fund could be dissolved in the same manner in which it had been created, that is by unanimous consent of all of the beneficiaries, the trustor (the Local Union) and the trustees. [R. Tr. p. 1317, line 1, to p. 1319, line 9.] Mr. Perkins did testify, however, that since he was not familiar with the by-laws and regulations of the Local Union, with respect to who had the authority to consent to the dissolution in behalf of the Union, it would be better to have it approved by the general membership. [R. Tr. p. 1848, line 7, to p. 1850, line 8; p. 1643, lines 7-18.] Accordingly, at the general membership meeting of September 27, 1959, the following occurred under the heading of new business:

> "Motion was made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payment to the pension plan and car allowance to paid employees and distribute these monies to the employees as salary, thereby placing the responsibility of the reporting to the government on the employee involved. Motion carried." [Ex. 44; R. Tr. p. 294, lines 3-15; p. 1314, line 24, to p. 1315, line 4.]

It should be noted that although it was not necessary under the By-Laws of Local 224 to present this matter to the general membership for its approval, it was nevertheless done by appellants as further evidence of the completely open and above board manner in which the severance fund was created, administered and finally terminated.

Thereafter Mr. Perkins, the attorney for the trust fund, prepared an agreement entitled "Agreement for Termination of Trust and Distribution of Assets". This agreement was approved by all of the beneficiaries, the Local through its executive board and the trustees of the severance fund. [R. Tr. p. 1844, line 24, to p. 1845, line 24.] Following this, Larry McBride, who managed the investments under the severance fund, was engaged to and did make an audit of the condition of the fund and distributed to each of the beneficiaries, including appellants, their proportionate shares. [R. Tr. p. 164, line 23, to p. 165, line 1; p. 168, line 23, to p. 169, line 3.] The two business agents, not members of the executive board, retained their proportionate shares and used such for their own private purposes. They were not indicted.

The remaining beneficiaries, all named defendants in this Indictment, desired to continue the fund as a joint investment and therefore established a fund denominated the "Security Fund". [R. Tr. p. 213, line 8, to p. 223, line 23; p. 1977, line 1, to p. 1978, line 6.] Thereafter their proportionate share of the severance

fund, together with some of their personal funds, were paid into the new security fund, thus making each of their shares equal. The security fund is still intact at this time.*

Count II (Arbitration Audit Check).

The impact of this count is the allegation that appellants expended Union funds ($220.00) for costs and expenses incurred in the dissolution of the severance fund. [Clk. Tr. p. 3.] There is no conflict in the evidence that Larry McBride handled the dissolution and received a Union check for $220.00, which included the actual paying out of recording costs and expenses incurred in the legal transfer of the trust deeds which made up a part of the severance fund. [R. Tr. p. 164, line 12, to p. 172, line 1; Ex. 2.]

Mr. McBride testified that he did "an audit" of the severance fund and furnished this audit to the trustees of the fund at a meeting at which all six beneficiaries were present. [R. Tr. p. 191, line 23, to p. 192, line 18.]

The Union check for $220.00 [Ex. 2] had the handwritten words "arbitration audit" appearing in the upper left-hand corner. Mrs. Dorothy M. Johnson, a witness for the prosecution, testified that this phraseology

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*As pointed out by counsel for appellants during the probation and sentencing hearing—it was agreed by appellants and defendants Hester and Barnes through their respective counsel and by counsel for the Union that this fund would be returned to and kept in tact by the Union with each side reserving their respective rights to title in the fund until this question of ownership could be litigated in a civil action. [R. Tr. p. 2840, line 18, to p. 2841, line 24.]

"arbitration audit" on the check might simply have resulted from a "misunderstanding". [R. Tr. p. 993, line 8, to p. 994, line 9.] Mrs. Johnson was the bookkeeper and office manager for the Union from the time of Gladys Rang's death in 1957 to the date of trial. [R. Tr. p. 860, line 16, to p. 861, line 1.] The words "arbitration audit" were in the handwriting of this witness, but she testified she recalled very little about this incident. However, she did testify that she normally but not always got instructions on such matters from appellant Woxberg. [R. Tr. p. 890, line 14, to p. 891, line 1; p. 992, line 12, to p. 994, line 14.] But neither the check nor any questions by counsel refreshed her memory in any manner whatsoever regarding the notation "arbitration audit" as to who told her to put this on the check, if at all. [R. Tr. p. 992, line 21, to p. 994, line 14.]

Counts IX and X (Jeep Transaction).

Counts IX and X apply to appellant Woxberg only. Appellant Dykes and defendant Hester were acquitted of these charges. [Clk. Tr. pp. 10 and 11.]

In Counts IX and X it is alleged that appellant Woxberg embezzled and converted to his own use the amount of $460.86. These counts relate to a transaction wherein the Union advanced certain moneys on behalf of appellant Woxberg for repairs performed and done on his jeep by Frank's Automotive Service.

Exhibits 9 and 10 are the checks for the payment of $355.00 and $105.86 to Frank's Automotive Service by the Union. These checks were signed by appellant Dykes and defendant Hester. [R. Tr. p. 885, line 2, to p. 887, line 4.] Appellant Woxberg never had any

personal contact with Frank's Automotive Service in any manner relating to the jeep. [R. Tr. p. 806, lines 1-7.] In April 1961, appellant Woxberg, who was not present at the Union during the time of the payment of the jeep checks, was advised by appellant Dykes that the work on the jeep had been completed and that the Union had advanced the money to pay for these repairs. Appellant Dykes advised him that he owed the Union a reimbursement. Appellant Woxberg, not being sure of the amount, said "Send me a bill". [R. Tr. p. 1395, line 17, to p. 1396, line 5.]

In 1962, after appellant Woxberg had severed all relations with the Line Drivers Local No. 224, a letter was sent to appellant Woxberg by appellant Dykes requesting payment of the $460.86. [Ex. N.] Appellant Woxberg immediately returned a personal check to the Union in the amount of $460.86. [R. Tr. p. 1397, lines 1-11; p. 981, line 23, to p. 982, line 12; Ex. M.]

In relation to the dates involved it was stipulated that appellant Woxberg received the bill for the payment of said $460.86 after an investigation in this matter had been started. But it was not stipulated nor was there any proof that he was aware of any investigation concerning any matters at the time he received the bill and paid it.

Mrs. Johnson, the Union bookkeeper explained in her testimony how the Union books were kept and in what manner such advances were made on the behalf of appellant Woxberg were recorded. [R. Tr. p. 974, line 17, to p. 976, line 24.] In Exhibit 41, a ledger card entitled "Expenses paid to Creditors", the 2 checks which were paid to Frank's Automotive Service on be-

half of appellant Woxberg are shown. No change or alteration of any of these books and records ever took place and the entries in the records are the same as of the date of entry. Mrs. Johnson explained that often times bills came to the Union which were actually appellant Woxberg's personal bills and that he would sort them out and directed her to pay these bills from his personal checking account which was kept at the office. [R. Tr. p. 868, line 11, to p. 869, line 11.] She further explained that the bookkeeping system of the Union, wherein the two checks for the repair of the jeep were scheduled under "expenses paid to creditors", was the only method at that time to show the mechanics of an item as a receivable. [R. Tr. p. 1038, line 20, to p. 1040, line 9.] Mrs. Johnson testified she received no instructions as to how to post such things as the repairs on the jeep, so she exercised her own judgment in this instance. [R. Tr. p. 1014, lines 13-23.]

For further confirmation of the fact that these items were receivables under the Union bookkeeping system, we look to Exhibit 42, a document entitled "An Expense Analysis". Exhibit 42 shows that the expense analysis for March 1, 1961 to April 6, 1961 discloses the check of $355.00 under the name of Homer L. Woxberg and for the period April 6, 1961 to May 5, 1961 discloses the second check of $105.86 under the name of Homer L. Woxberg.

Exhibits 74 and 75 constituted card records of moneys paid back to the Union for advances made on behalf of employees, members and others for which the Union was later reimbursed. These two exhibits show a total of 611 entries, ranging from 25 cents for a

lapel pin up to an amount of $1,500.00, which had been reimbursed to the Union after advances. There were other exhibits showing the method of reimbursement back and forth between the Union and paid employees. Exhibit Y was an advance made by Woxberg to the Mission Inn for which he was not reimbursed. Exhibit Z was a reimbursement of the Union for a mistake in a Christmas gift concerning cheeses. Exhibit X constitutes four checks for reimbursement to the Union signed by Mrs. Johnson on the personal account of appellant Woxberg, at a time when he was away.

Specification of Errors.

Based upon this record, appellants present the following contentions and specification of errors for this Court's consideration:

Count I.

1. The conversion of the Union refund checks, if unlawful, occurred before the effective date of the passage of the Landrum-Griffin Act (September 14, 1959) and as such the prosecution and conviction of appellants under Count I constitute an *ex post facto* application of Section 501(c) in violation of Article I, Section 9(3) of the Constitution.

In connection with this point, appellants present the following assignment of errors:

(a) It was a question of law for the District Court to decide when the alleged unlawful conversion of Union property occurred under Count I, and therefore the District Court

(1) erred in instructing the jury that this was a question of fact for them to decide as follows:

> "Now, I want to go back and discuss with you for just a moment or two the indictment. Count I concerns the severance fund and a large part of the testimony in this case concerns the severance fund and a large part of the testimony in this case concerns count 1, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not. I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.
>
> "They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?
>
> "Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

" 'The membership by resolution duly adopted voted to make certain contributions to a severance fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

"Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count I, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money."

[R. Tr. p. 2778, line 8, to p. 2779, line 22. This instruction was excepted to by appellants, R. Tr. p. 2789, line 19, to p. 2790, line 16; p. 2694, line 9, to p. 2696, line 10.]

(2) erred in refusing to give Defendants' Proposed Jury Instruction No. 34:

" 'You are instructed that if you find from all the evidence that on or about November 2, 1959, funds in the sum of approximately $35,178 had been deposited in the severance fund, Line Drivers Local 224 Trust, as authorized in the rules or by-laws of said Local 224, or if you entertain a reasonable doubt, that said funds belonged to said

union, you are then instructed that you must return a verdict of not guilty on count 1 for the reason that in such circumstances, as a matter of law, title in such funds would be in the severance fund and not Local 224, and, therefore, there could be no theft or embezzlement of union funds as charged in the indictment.'" [Clk. Tr. p. 172; R. Tr. p. 2694, line 9, to p. 2696, line 10]; and (3) erred in denying appellants' motions for acquittals [R. Tr. p. 1124, line 9, to p. 1125, line 1; p. 1178, lines 13-8.]

(b) Even if it was properly a question of fact for the jury, the uncontradicted evidence shows that the conversion occurred and title passed to the trustees of the severance fund when each refund check was deposited in the severance fund account, which acts all occurred prior to the effective date of the passage of Section 501(c).

2. The evidence is insufficient to support a conviction under Count I for a violation of Section 501(c) because:

(a) the conversion of the Union funds was done with the consent of the Union and was therefore not unlawful as a matter of law;

(b) the Court erred in refusing to give Defendants' Proposed Jury Instruction No. 47:

"You are instructed that as a matter of law the proceeds from funds resulting from contributions made to a pension plan are when distributed a form of wages. As a result if you find from the evidence in this case that the Executive Board of Local 224 had the power in itself to set wages

and conditions of employment of employees of the Union then in that event the Executive Board was empowered to provide a pension plan and that they did not have to go to the general membership for that purpose.

"Therefore if you find from the evidence in this case that the Executive Board alone set up a pension plan for payment at severance of employment to the paid employees this was doing only what they had a right to do." [Clk. Tr. p. 181];

(c) because there is no evidence from which fraudulent intent on the part of appellants can be inferred since they acted openly and under a *bona fide* claim of right in creating and dissolving the severance fund; and (d) the court erred in refusing to give Defendants' Proposed Jury Instruction No. 38:

"If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable

deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." [Clk. Tr. p. 175.]

Count II.

The evidence is insufficient to show any fraudulent intent on the part of appellants; and the District Court erred in refusing to give Defendants' Proposed Jury Instruction No. 38, quoted above. [Clk. Tr. p. 175.]

Counts IX and X.

The evidence is insufficient to show any taking of Union property by appellant Woxberg or any fraudulent intent on his part; and the District Court erred in refusing to give Defendants' Proposed Jury Instruction No. 38, quoted above. [Clk. Tr. p. 175.]

ARGUMENT.

Introductory Statement.

The convictions in this matter are all predicated upon violations of Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, commonly known as the Landrum-Griffin Act, which section provides as follows:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both." [29 U. S. C. §501(c).]

It is, of course, well settled that there is no Federal common law. When Congress enacts a statute prescribing a certain course of conduct as criminal and in so doing adopts or uses common law terms of established meaning without otherwise defining them, the general practice is to give those terms their common law meaning and scope [See *United States v. Turley,* 352 U. S. 407, 77 S. Ct. 397, 1 L. ed. 2d 430 (1957); *Boone v. United States,* 235 F. 2d 939 (4th Cir. 1956)]. Under Section 501(c), Congress intended to punish unlawful conversion of union funds and property in much the same manner as they prescribe criminal penalties for criminal conversion under Title 18, United States Code, Section 641.*

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*Section 641 provides criminal punishment for embezzlement and theft of public monies and property. Note the similarity of the language used in this Section and in Section 501(c) with which we are here concerned.

In discussing the elements essential to prove criminal conversion under that section, the Supreme Court in *Morissete v. United States,* 342 U. S. 246, 72 S. Ct. 240, 96 L. ed. 288 (1952), stated:

> "It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. *Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.' . . .*
> *Conversion, however may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. . . .*
>
> "The purpose which we here attribute to Congress parallels that of codifiers of common law in England and in the States and demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses. It is significant that the English and State codifiers have tried to cover the same type of conduct that we are suggesting as the purpose of Congress here, without, however, departing from the common law tradition that these are crimes of intendment.

> "We find no grounds for inferring any affirmative instruction from Congress to eliminate *intent* from any offense with which this defendant was charged." [342 U. S. at pp. 271-273. Emphasis added.]

Thus, in applying Section 501(c) to the facts in the case at Bar, this Court must, as was the District Court, be concerned with the common law elements of embezzlement, larceny or unlawful conversion. With respect to appellants' assignment of errors concerning the *ex post facto* application of Section 501(c) it will be necessary to examine basic common law principles concerning the necessity for concurrence of act and intent and to examine the common law distinction between embezzlement and larceny. Furthermore, whether the government contends that the evidence is sufficient to support the offense of embezzlement, or larceny, or unlawful conversion as to each count, it is necessary in all three instances that the evidence show (1) a fraudulent intent, and (2) that the taking or appropriation was unlawful, that is, without right and without consent of the union and its general membership. [*Taylor v. United States,* 320 F. 2d 843 (9th Cir. 1963).] With these general principles in mind, let us first turn our attention to Count I, the severance fund.

I.

The Prosecution and Conviction of Appellants Under Count I Constitutes an ex Post Facto Application of Section 501(c) in Violation of Article I, Section 9(3) of the Constitution.

Appellants contend that insofar as Count I is concerned, the conversion, if unlawful and constituting embezzlement or theft under Section 501(c), occurred when each of the four refund checks were endorsed and deposited in the severance fund account (March 1,

1955, February 23, 1956, March 7, 1957 and February 4, 1958), which acts occurred prior to the effective date of this statute, September 14, 1959. [See Pub. L. 86-257, 73 Stat. 519 *et seq.* Sept. 14, 1959.]

It has long been established under Article I, Section 9(3) of the Constitution that *ex post facto* laws, retrospective criminal statutes applying to acts committed before its enactment, are prohibited. [See *Harisiades v. Shaughnessy,* 342 U. S. 580, 72 S. Ct. 512, 96 L. ed. 586 (1952).] Stated in other terms, a law creating a new offense or punishing an act not punishable when committed is *ex post facto* as to acts committed before its passage. [*Beazell v. State of Ohio,* 269 U. S. 167, 46 S. Ct. 68, 70 L. ed. 216 (1925).]

While retrospective application of the Landrum-Griffin Act in a criminal case (under Section 501(c)) has not come to the attention of our Federal Courts before this appeal, it has been judicially determined in a civil action that the provisions of Section 501(a) and (b) cannot be applied retrospectively to alleged wrongful conduct of union officials which occurred prior to the effective date of this tatute. [*Highway Truck Drivers and Helpers Local 107 v. Cohen,* 182 F. Supp. 608 (D. C. Pa. 1960), affirmed 284 F. 2d 162, cert. den. 365 U. S. 833, 81 S. Ct. 747, 5 L. ed. 2d 744; see also *Miller v. United States,* 294 U. S. 435, 439, 55 S. Ct. 440, 79 L. ed. 977 (1935) and *Flaherty v. McDonald,* 183 F. Supp. 300 (S. D. Cal. 1960).] It would follow with greater force under the constitutional provision prohibiting *ex post facto* laws that this statute cannot be applied to criminal conversions committed prior to the effective date of the enactment of this statute. This is especially true since there is no Federal common law and defendants can only be prosecuted

in the Federal Courts for embezzlement and larceny of union property and funds under the authority of the Landrum-Griffin Act. Thus, a law like the Landrum-Griffin Act which confers jurisdiction on a Federal Court over certain criminal conduct (here the embezzlement and theft of union funds and property) where none before existed, can only be applied to acts committed after the effective date of its passage.

The question to be answered, therefore, is when did the unlawful conversion occur. The government in its indictment under Count I alleges that the conversion occurred on November 2, 1959 [Clk. Tr. p. 2], the date the severance fund was dissolved and the proceeds distributed to the beneficiaries, appellants herein, Defendants Barnes and Hester, and Wasson and McBride who were not indicted. [R. Tr. p. 155, line 7, to p. 169, line 13; p. 209, line 10, to p. 218, line 16.] Appellants contend, however, that the conversion, if unlawful, occurred at the time the insurance refund checks, then property of the union, were endorsed and deposited in the severance fund account. Thus, before determining whether or not the prosecution and conviction under Count I constituted a retrospective application of Section 501(c) in violation of Article I, Section 9(3) of the Constitution prohibiting *ex post facto* laws, this Court must determine when the alleged criminal conversion occurred.*

The mechanics of answering this question was a principal issue in the trial. Appellants' motions for acquittals were in part based upon the premise that the conversion occurred when the severance fund was originally

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*For sake of argument only on this point appellants may concede that the conversion was criminal. However, we intend to point out under Point II of our argument that this was not the case, since the transfer was done under right and without any fraudulent intent.

created and the insurance refund checks deposited in the severance fund account. [R. Tr. p. 1124, line 9, to p. 1125, line 1.] The motions for acquittals were denied by the District Court. [R. Tr. p. 1178, lines 8-13.] The District Court then instructed the jury that this was a question of fact for them to determine, recognizing that if they found that title passed to the trustees of the severance fund when the checks were originally endorsed and deposited in the severance fund account, the defendants must be found not guilty [R. Tr. p. 2778, line 8, to p. 2779, line 25.] Appellants contended that this was a question of law and excepted to the court's instructions to the jury that this was a question of fact. [R. Tr. p. 2789, line 19, to p. 2790, line 16; p. 2694, line 9, to p. 2696, line 10; Defendants' proposed instruction No. 34, Clk. Tr. p. 172.]

To answer this question we shall demonstrate first that the question is one of law and the court erred in denying appellants' motions for acquittal and in refusing to give defendants' proposed instruction No. 34 and in instructing the jury instead that it was a question of fact. In other words, as a matter of law the conversion of union property occurred in each instance as the refund checks were endorsed and deposited in the severance fund account.

Second, that even if it is a question of fact, the uncontradicted evidence clearly shows that title to the insurance refund checks, the union property, passed to the trustees of the severance fund at the time each check was endorsed by the union officials and deposited in the severance fund account. Thus, under either circumstance, the government's prosecution of appellants under Count I and their subsequent conviction, amounts to an *ex post facto* application of Section 501(c) in violation of Article I, Section 9(3) of the Constitution.

1. **It Is a Question of Law for the Court to Determine From the Facts as to When the Alleged Criminal Conversion Occurred in a Prosecution for Embezzlement and Theft Under Section 501 (c) of the Landrum-Griffin Act and the Court Erred in Denying Appellants' Motions for Acquittal, in Refusing to Give Defendants' Proposed Instruction No. 34 and in Instructing the Jury That This Was a Question of Fact for Them to Decide.**

To answer these questions, we must examine the basic concepts of criminal liability and in particular the meaning and scope of embezzlement and larceny, *i.e.*, the forms of unlawful conversion with which we are here concerned. For as demonstrated in our Introductory Statement to our Argument, *supra,* when Congress enacts a federal criminal statute and uses common law terms of established meaning without otherwise defining them, the courts in applying such a statute, will give those terms their common law meaning and scope. [See *United States v. Turley,* 352 U. S. 407, 77 S. Ct. 397, 1 L. ed. 2d 430 (1957).]

It is fundamental that criminal liability is predicated upon a union of act and intent. When a particular state of mind is prescribed by common law or statute (as is the case here) as a prerequisite to responsibility, the act and intent must concur in point of time. [Clark and Marshall, Crimes, p. 240 (6th Ed. 1958).] Although there are basic distinctions between embezzlement and larceny, through use of a fiction there is in each instance the necessary concurrence of act and intent. The distinction between embezzlement and larceny has amply been stated by the Supreme Court as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come;

> and it differs from larceny in the fact that the original taking of the property was lawful or with consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." [*Moore v. United States,* 160 U. S. 268, 269, 270, 16 S. Ct. 294, 40 L. ed. 422 (1895).]

In larceny then, the intent exists *in fact* at the time of the trespass, *i.e.*, the wrongful taking or appropriation. [Clark and Marshall, Crimes, p. 743 (6th ed. 1958).] In embezzlement the trespass or wrongful conversion occurs *in law* at the time the defendant forms the intent to deprive the owner of property which is rightfully in the defendant's possession because of the relationship of trust and confidence. [Clark and Marshall, Crimes, p. 800 (6th ed. 1958).] Thus, by use of this fiction, there is the necessary concurrence of act and intent as a predicate to criminal responsibility in embezzlement.

Applying these principles to the undisputed facts in the case at bar, one may at first blush reach what appears to be either of two reasonable conclusions: (1) The original taking, the creation of the severance fund and the deposit of the insurance refund checks in the severance fund account was wrongful because at that instant the defendants fraudulently intended to deprive the union of these funds (embezzlement or larceny), or (2) the severance fund was in its inception legally and properly created by appellants and the insurance refund checks properly and legally transferred to the trustees under the severance fund by deposit in the severance fund account, but *without the passage of title from the union to the trustees.* Later, after passage of the Landrum-Griffin Act, appellants formed a fraudulent intent to embezzle these funds and then dissolved the severance fund and distributed the proportionate shares to the beneficiaries of the trust (embezzlement only.)

The first conclusion we concede is reasonable and the second we contend is unreasonable and not supported by the evidence or the law.

It is only in the second instance that the government's case does not run afoul of the Constitution's prohibition against *ex post facto* laws. However, in that instance, the government's case must fail for two reasons: (1) We will demonstrate under our Argument in Point II to follow that the evidence is insufficient to support the conviction, for if the severance fund was *legally created in the first instance* appellants could not have fraudulently converted these funds to their own use by dissolving the severance fund on November 2, 1959. (2) More significantly—as a matter of law—title passed to the trustees when the severance fund was originally created and title was no longer in the Union.

In the first instance, the government cannot contend, in hope of avoiding the prohibition of Article I, Section 9(3) of the Constitution, that the intent was originally fraudulent when the severance fund was created, but the conversion occurred later and after the passage of the Landrum-Griffin Act, because this would violate the basic common law concept that criminal responsibility is predicated upon a concurrence of act and intent, and this is true as indicated *supra,* whether you speak in terms of embezzlement or larceny.

If the government contends that the criminal conduct here was larceny rather than embezzlement, then it must follow as a matter of law that the unlawful conversion occurred when title to the insurance refund checks was transferred to the severance fund as each check was endorsed and deposited in the severance fund account. Thus, even assuming that the original taking was without right, and with fraudulent intent, appellants could not be prosecuted for violating Section

501(c) because this statute was not law at the time these conversions occurred, that is, between 1955 and 1958.

There should be little doubt on this record that upon the transfer of the insurance refunds to the trustees under the Trust Agreement [Ex. E], the Union no longer had any voice in the management and use of these funds except that under established principles governing trust, the trustor, the Union, must join with the beneficiaries in dissolving the trust before its normal expiration. This was done in the case at bar. [Ex. G.] This does not mean, however, that the Union still held incidents of title. The trustees, therefore, held title and not the Union. The well settled general rule is that "Where a trust is valid . . . , the trustee is the holder of the *legal title* and the *cestui que* trust takes the equitable estate or beneficial interest, the beneficial interest under some statutes, being not an equitable title, but merely the equitable right to enforce the performance of the trust, . . ." [90 C.J.S., Trust, Sec. 175, p. 59. Emphasis added.]

To hold otherwise would not only contravene the above stated general principle, but would establish the precedent that one could give a salary, make a gift, make a bonus or some other form of executed compensation (here in the form of a trust) and then demand and receive its return upon no contractual basis. Once the funds were transferred to the trustees, the Union had no authority over these funds whatsoever. Later action by the trustees, the Union and the beneficiaries in terminating the trust and distributing the proceeds cannot be the predicate for a conversion of Union funds. It is a sound principle that once a misappropriation or missapplication of funds has been completed, it is immaterial what the defendants thereafter do with such funds. [See *United States v. Ruse,* 112 F. Supp. 667, 668 (D. C. Pa. 1953).]

That legal and equitable title to the funds was in the trustees and the beneficiaries and not in the union is amply supported by the following excerpts from decisions in which the question of the employees' rights to pensions and annuity funds were raised:

> "Where collective bargaining agreements creating union welfare funds provided that fund was an irrevocable trust created pursuant to statute and that the fund should be for all purposes provided or permitted in statute, agreement plainly declared what statute required, namely, that fund be used for the sole and exclusive benefit of employees, their families and dependents and [the] *fund was in no way an asset or property of the union.*" [*Lewis v. Benedict Coal Corp.,* 361 U. S. 459, 465, 80 S. Ct. 489, 4 L. ed. 2d 442 (1960.) Emphasis added.]

Additionally, in *Hobbs v. Lewis,* 159 F. Supp. 282 (D.C. 1958), an action by an employee to recover pension plan money, the court held that the employee was entitled to this pension, not only as to the immediate payments which had accrued, but also as to future payments. The court stated that ". . . an employee had a contractual right to this pension, if and when he comes within the regulations prescribed by the trustees." [159 F. Supp. at p. 286.] Thus, in the case at bar, when the paid employees of the union qualified under the terms of the trust as beneficiaries, their rights to the funds in the trust accrued at that time. [See Ex. E.] All of the defendants in the case at bar qualified as beneficiaries prior to the enactment of the Landrum-Griffin Act.

In *Hind v. Illinois Bell Telephone,* 234 F. 2d 942 (7th Cir. 1956), a case which involved the claims of

employees that an employer under a private pension plan could not subtract social security benefits from their proportional shares in the pension fund, the court said:

> "The pension plan is a unilateral contract which creates *a vested right* in those employees who accept the offer it contains by continuing in employment for the requisite number of years." [234 F. 2d at p. 946. Emphasis added.]

For similar analogies that the employees have a vested right in the pension plan funds once they qualify see *Richfield Oil Company v. N. L. R. B.,* 231 F. 2d 717 (D.C. 1956); and *Ball v. Victor Adding Machine Company,* 236 F. 2d 170 (5th Cir. 1956).

Thus, the court in this case was required to find as a matter of law that the title to the union funds, the insurance refund checks, passed to the trustees and the beneficiaries under the trust at the time that each check was endorsed and deposited in the severance fund account. Therefore the District Court should have granted appellants motions for acquittals. In denying the motions and leaving this question to the jury, the District Court allowed the jury to reach a decision inconsistent with the facts and law in this case. The effect of the court's failure to use defendants' proposed Instruction No. 34 and in instructing the jury as it did, resulted in their finding that the conversion occurred and title passed when the severance fund was dissolved, and is, we submit, obviously prejudicial, since any other finding by the court or jury would contravene the prohibition against *ex post facto* laws as provided by Article I, Section 9(3). Any other finding would result

in a retrospective application of Section 501(c) to conduct which occurred prior to the effective date of its passage, September 14, 1959.

2. Assuming That This Was Properly a Question of Fact for the Jury, the Uncontradicted Evidence Clearly Shows That Title to the Insurance Refund Checks Passed at the Time That They Were Endorsed and Deposited in the Severance Fund Account.

The uncontradicted facts are these. The severance fund was created in April of 1955. The union property, the insurance refund checks, were endorsed and deposited into the severance fund account between 1955 and 1958. All these acts occurred prior to the effective date of the passage of the Landrum-Griffin Act September 14, 1959. The severance fund was managed by the trustees under the trust fund agreement and not by the union.

Where in the case at bar is there any evidence which indicates that title to the insurance refund checks was still held by the union and was not transferred until the severance fund was dissolved on November 2, 1959? The severance fund agreement [Ex. E] clearly indicates that the trustees of the severance fund had full control and authority over the use of the funds deposited to their account. Furthermore, Mr. Perkins, an attorney-at-law, a qualified expert witness, testified that in his opinion title to the insurance refund checks belonged in the trustees under the severance fund agreement and not in the union. [R. Tr. p. 1818, line 1, to p. 1819, line 2; p. 1829, line 5, to p. 1831, line 17.] No other witness was called to contradict the opinion of Mr. Perkins. All of the defendants testified that

at the time it was decided to dissolve the trust fund, they considered that the money was already lawfully theirs. Further, the other beneficiaries of the trust who were not indicted (Lawson and McBride) were called as witnesses for the government, and each testified that they believed that the money in the severance fund was lawfully theirs. [R. Tr. p. 264, lines 15-24; p. 403, lines 19-24.]

Where is the evidence to support the jury's finding that title to the severance fund moneys was still in the Union at the time it was dissolved on November 2, 1959? There is none. Therefore, the jury should have, even assuming the District Court's instructions on this matter were proper, have found the defendants not guilty. Their failure to do so when combined with the error in instructing them that this was a question of fact, constitutes a violation of Article I, Section 9(3) by retrospectively applying the penalties of a criminal statute to conduct which occurred prior to the effective date of its passage.

Therefore, even assuming for the sake of argument, that the evidence is sufficient to show the existence of fraudulent intent and wrongful appropriation, it is submitted that the evidence clearly shows without contradiction, and as a matter of law that the appropriations occurred prior to the effective date of the passage of the Landrum-Griffin Act. Thus, the government's attempt to prosecute appellants under the authority of Section 501(c) and their subsequent conviction as to Count I is a clear violation of Article I, Section 9(3) of the Constitution as an *ex post facto* application of a criminal statute. For these reasons, the convictions under Count I, without any other considerations, must be set aside.

II.

The Evidence Is Insufficient to Support a Conviction Under Count I for a Violation of Section 501(c) Because the Conversion of the Union Funds Was Done With the Consent of the Union and Was Therefore Not Unlawful as a Matter of Law and Because There Is No Evidence From Which Fraudulent Intent on the Part of Appellants Can Be Inferred.

In asking this Court to review the conviction as to Count I on the basis of the insufficiency of the evidence, appellants are well aware of the general rule that in testing the sufficiency of the evidence in the trial court as well as before an appellant tribunal, one must view the evidence and the inferences which may be justifiably drawn therefrom in a light most favorable to the government. In other words, the verdict must be sustained if there is substantial evidence taking a view most favorable to upholding the verdict. [*Glasser v. United States,* 315 U. S. 60, 80, 52 S. Ct. 457, 86 L. ed. 680 (1942); *United States v. Decker,* 304 F. 2d 702, 705 (6th Cir. 1952).]

We shall demonstrate within the framework of these basic principles, first that the evidence is uncontradicted in showing that the conversion, *i.e.,* the creation of the severance fund, was lawful and with right since the union, the rank and file members, consented to the creation of the severance fund in that (1) appellants were vested with the authority under the By-Laws of the Union to fix their wages with the approval of the executive board, (2) the severance fund as such were wages to appellants for services rendered to the Union and (3) the creation of the fund as additional compensation was regularly carried out in accordance with the Union's By-Laws. Second, in connection with the above point, appellants contend that the District Court

erred in failing to give Defendants' Proposed Jury Instruction No. 47. Finally, we intend to demonstrate that the evidence is insufficient to show any fraudulent intent on the part of appellants in the creation and dissolution of the severance fund, because they acted under a *bona fide* claim of right, and in this connection, the Court erred in refusing to give Defendants' Proposed Jury Instruction No. 38.

1. Appellants as Officers of the Union and Members of the Executive Board Had the Authority and Legal Right Under the By-Laws of the Local Union to Establish the Severance Fund as Additional Compensation Which Function Was Regularly Carried Out.

We have already alluded to the fact that the severance fund as a pension plan for severance pay to the paid employees of the Union was in the form of additional wages or salaries to appellants (*supra,* Point I, pp. 37-38). This is true, regardless of the title given to the fund. The law is clear that to constitute "wages", the particular compensation paid by an employer to his employee for services rendered, does not necessarily have to be in the form of a monthly or hourly wage. It may be in many forms, such as medical benefits, bonuses, Christmas gifts or as in this case, a pension fund or severance fund. As stated in *Pacific American Fisheries v. United States,* 138 F. 2d 464 (9th Cir. 1943) at page 465:

> "Generally, 'wages' means compensation for labor or services which may be in the form of money paid, or other value given, such as board, lodging or clothes"

Thus, the name given to compensation is unimportant. It is the intent by which the employer means to compensate his employee that is material.

> "Wages are the compensation paid by an employer for the services rendered to him by others,

> and the essential character of such compensation is not altered by designating part of it 'War Bonus'." [*Glandzis v. Callincos,* 140 F. 2d 111 at p. 113 (2nd Cir. 1944).]

Additionally and more pointedly, our courts have stated:

> *". . . that plan was dignified by the title 'annuity plan', but the name is of no particular importance. It was manifestly a pension plan, a retirement allowance plan, and the payments made under it were payments of pension or retirement allowances. A pension is a 'stated allowance or stipend, made in consideration of past services or of the surrender of rights or emoluments, to one retired from service'.* Webster New International Dictionary. *It cannot be doubted that Pensions or Retirement Allowances paid because of past services are one form of compensation for personal services and constitute taxable income to the recipients . . ."* [*Hooker v. Hoey,* 27 F. Supp. 489 at p. 490 (D.C. N.Y. 1939), Emphasis added.]

Further, in an action involving a pension fund under a collective bargaining agreement, the court stated:

> ". . . payments into the fund are part of the compensation received by the employee over and above his weekly wages. The services rendered by him are the consideration for both his wages and his pension." [*Kennet v. United Mine Workers of America,* 183 F. Supp. 315 at p. 317 (D.C. 1960).]

Thus, when the executive board passed a resolution to establish a trust fund for severance pay for the paid employees of the Union, they were in fact making provisions for additional compensation to these employees.

The significant portions of the By-Laws of the Local Union which were in force at the time the severance

fund was created and then later dissolved, which rules and regulations were adopted at the first general membership meeting of the Union on November 23, 1947, show:

> "(2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the secretary-treasurer and the president, subject to the approval of the executive board.
>
> "(3) All employees of Local No. 224 shall be employed and directed by the secretary-treasurer and president.
>
> "(4) Salary and expenses of all employees shall be set and approved by the secretary-treasurer and the president, subject to the approval of the executive board. No action shall be taken by the executive board or the membership meetings of Local No. 224 that in any way effects policy or expenditures of money in the absence of the secretary-treasurer and president.
>
> "(5) The office of secretary-treasurer shall be the only elective paid position on the executive board of the local union.
>
> "(7) The executive board shall be empowered by the local union to conduct all the business of the local between regular meetings.
>
> "(8) It will take two-thirds (2/3) majority vote of entire membership to change the above rules." [Ex. 43; R. Tr. p. 1204a, line 15, to p. 1207, line 13.]

These provisions clearly indicate that appellants as officers and members of the executive board had full authority to establish a pension plan for the paid employees of the union. Certainly it cannot be contended that the placing of the responsibility for matters concerning salaries and compensations of the paid employees of the union in the officers with approval of

the executive board was not a correct and proper administration of union business. In many instances the constitution and by-laws of trade unions have been fully supported by our courts, if properly enacted and equitable in their nature, and no contention was made to the contrary in the case at bar. In defining the respective rights, duties and responsibilities of its officers and the rank and file members, our courts have stated:

> ". . . [T]he constitution and by-laws of the union, (unless contrary to good morals or public policy, or are otherwise illegal) which are duly enacted through democratic processes, bind all members." [*Dyer v. Occidental Life Insurance Company of America,* 182 F. 2d 127 at p. 130 (9th Cir. 1950).]

Likewise, in *Martin v. Kansas City Southern Railroad Company,* 197 F. Supp. 188 (W. D. L. A. 1961), the court stated:

> ". . . [P]rovisions of a Union's Constitution and By-laws are binding upon Union members to the extent that such provisions are reasonable and fair." [197 F. Supp. at p. 191.]

Thus it can be seen that under the Local Union's rules and regulations and in line with the above decisions, the secretary-treasurer and president, appellants herein, of this union, had full authority with the approval of the executive board to regulate salaries and expenses of all employees.

The uncontradicted facts in the case at bar show that in establishing the severance fund, appellants and the executive board fully complied with the union's rules and regulations. On February 28, 1954, the executive board decided at a regular executive board meeting to create a pension or other similar fund for the paid of-

ficers and employees of the union. Notwithstanding it was unnecessary to submit this matter to a vote of the general membership under the Union By-Laws, the executive board nevertheless at a meeting of the general membership on the very same day caused the minutes of the executive board containing this motion concerning the severance fund to be read. This matter went over to new business in accordance with the regular order of business in conducting the union meetings. Under new business a motion was made by one Finley and seconded by another rank and file member to accept the resolution of the executive board. At this point, Appellant Woxberg explained to the general membership the purpose of the severance fund and indicated that it was in lieu of wage raises over the next ten years. Admittedly this was a controversial subject at the general membership meeting on that date and the motion was tabled until the next regular meeting. [R. Tr. p. 1235, line 5, to p. 1241, line 9; Ex. 44.]

Again this matter came up under old business at the next regular general membership meeting on March 28, 1954, and a motion was made at that time to table the matter indefinitely. [R. Tr. p. 282, lines 7-25.] The objection of the rank and file members was to the effect that if you get us a pension plan first from our employers, then you can have one—meaning the officers and paid employees of the local Union. [R. Tr. p. 280, line 9, to p. 282, line 8.]

Immediately thereafter, the officers of the Union, including appellants herein, began negotiations with the employers for the purpose of negotiating a pension plan for the rank and file members of the Union (which negotiations were successful). [R. Tr. p. 1244, line 16, to p. 1247, line 1.] While these negotiations were still in progress, the executive board, on March 27, 1955, considered the matter of severance pay instead of

a pension plan for the paid employees of the Union and passed the following resolution:

> "After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the secretary authorizing him to have an attorney draft a trust agreement covering severance pay for the paid officers and office manager and deposit the insurance refunds in the severance trust. Motion carried." [Ex. 44.]

These minutes were read and approved by the rank and file members at the general membership meeting on the same day. [Ex. 44; R. Tr. p. 285, line 25, to p. 286, line 23.] It should be noted that prior to the executive board meeting of March 27, 1955, appellant Woxberg, as secretary-treasurer and head of the Local Union, had conferred with Richard Perkins, an attorney, as to whether or not such a fund could be created. [R. Tr. p. 1812, line 22, to p. 1813, line 1.] Mr. Perkins advised him that it could be done, and did in fact prepare the "Agreement and Declaration of Trust Severance Fund Line Drivers Local 224." [R. Tr. p. 1814, line 13, to p. 1816, line 15; Ex. E.]

On April 3, 1955, at a special executive board meeting, the following resolution was passed:

> "The secretary read the severance fund trust agreement. A motion was made and seconded that the severance trust agreement be approved effective April 1. Motion carried." [Ex. 44.]

There was a special general membership meeting on that date but the minutes were not read. At the next regular general membership meeting on April 24, 1955, the minutes of the executive board meeting of April 3, 1955, were read and approved. [Ex. 44.] In accordance with the declaration of trust, Exhibit E, insurance refund

checks for the period 1955 through 1958 were deposited in the severance fund account at the California Bank. [Exs. 1, 29, 30, 31 and 32.]

Thus, in each instance, the uncontradicted record discloses that the executive board approved the formation of the severance fund and the deposit of the insurance refund checks in that fund for the benefit of the paid employees of the Union in accordance with their authority to regulate and fix wages and compensation.

Likewise, when the severance fund was dissolved, the following resolution was adopted by the executive board at its regular meeting on September 27, 1959:

> "Motion made and seconded that the secretary-treasurer be authorized in conjunction with the attorneys to discontinue payments to the severance and pension fund plan and car allowances to paid employees, and to distribute these moneys to the employees as salary, thereby placing the responsibility of reporting to the government on the employee involved. Motion carried." [Ex. 44.]

Again, while it was not necessary, a similar motion was passed at the general membership meeting on September 27, 1959. [Ex. 44; R. Tr. p. 294, lines 3-15.]

It is fundamental to common law criminal responsibility that the taking, the appropriation, the conversion, must be unlawful, that is without right, without the owner's consent. [Clark and Marshall, CRIMES, pp. 741, 759.] This principle must equally apply to conversions under 501(c) by analogy to decisions under Title 18, United States Codes Section 656, involving unlawful conversions of bank moneys and properties. Under this statute, which is very similar in language to 501 (c), it has been held that a misapplication or misappropriation of funds which would otherwise be criminal, is not an unlawful conversion when done with

the consent of the board of directors of the bank. [See *United States v. Youtsey,* 91 Fed. 864, at p. 869, 870 (C. C. Ky., 1898), reversed on other grounds, 97 Fed. 937; *United States v. Breese,* 131 Fed. 915 at p. 925 (D. C. N. C., 1904), reversed on other grounds, 143 Fed. 250.]

Although Congress seemed to be more concerned with the civil aspects of the fiduciary obligations imposed upon union officials rather than criminal responsibility and punishment, there is some evidence from an examination of the legislative history and secondary authority that Congress did not intend to eliminate lack of consent as an essential element of the government's proof under Section 501 (c).

In a symposium* on the legislative history and meaning of the Landrum-Griffin Act, we find the following brief discussion of the scope and effect of Section 501 (c), which we submit, has particular application to this facet of the case at bar.

> "It will be noted that while sections 501 (a) and (b) dealt primarily with persons who were affiliated with labor unions in a position of some authority or in some representative capacity, section 501 (c) is much broader in scope. Embraced in its scope are not only officers of unions but also any person who is 'directly or indirectly' employed by the union. Of course, the crime created refers only to stealing from the person's own union. The section does not make a crime the stealing or conversion of moneys belonging to a union of which the person is not an officer or employee.
>
> "An officer or employee who embezzles or steals from his union, or converts to his own use union

*Because the Statute is so new, with little case authority interpreting it, we shall call the Court's attention to secondary authority only as an aid to the Court in interpreting the scope and meaning of this new Act.

funds, is not only subject to prosecution, but also commits a crime if he does these acts for the use of another. Thus the unlawful siphoning of union funds by union officials or employees into the pockets of third persons is prohibited.

"What is the status of 'payroll padding' in unions under section 501 (c)? The investigators of the Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee) revealed a practice in some unions of putting persons on the payroll of the union who had difficulty in explaining to the Committee what their duties were and whether any such duties had ever been carried out by them. In view of the provisions of section 504 (a) limiting the eligibility for union office of persons with criminal records it may be anticipated that such individuals will find a haven in non-prohibited clerical or custodial positions.

"Is there a violation of this section if it can be proven that actually such employees have been engaged in order to give them a sinecure; or, if they do work, they are engaged at grossly high pay in the light of the duties which they fulfill? Is this stealing, embezzlement or unlawful and willful abstraction or conversion of union funds? *The statutory language deals with a situation wherein moneys are taken when there is no authority to do so.* Therefore, the mulcting of unions through the establishment of sinecures does not seem to fall within the scope of the criminal provisions of the statute, inasmuch as the employment of such persons is an authorized one." [Symposium on the Labor-Management Reporting and Disclosure Act of 1959, pp. 526-527, Tulane University, 1961. Emphasis added.]

Thus, even if we assume that the creation of a severance fund constituted unfair or grossly high compensation to the paid employees of the Union, nevertheless in the opinion of the writer of that article, this would not constitute an embezzlement or unlawful conversion under Section 501 (c). His conclusion that *"The Statutory language deals with a situation wherein moneys are taken where there is no authority to do so"* is a logical analysis in light of the common law requirement that an unlawful conversion occurs only when property is taken without right, without consent. Thus, where as here, the By-Laws of the Local Union authorize the fixing of salaries by the officers with approval of the executive board, such officers cannot be prosecuted for embezzlement or unlawful conversion, even if it be assumed they overreached the bounds of discretion with which they were clothed. Such action might well subject them to just criticism, but not prosecution for criminal conduct.

This view, that authorized expenditures under the local charter, by-laws, constitution or resolution of the Union are not a basis for either civil or criminal prosecution, is also shared by Dean Frank J. Duncan, Dean of the Graduate School of Law, Georgetown Law Center, an authority on labor law matters. In an article in a symposium conducted by Georgetown Law School and published in the Georgetown Law Journal, Dean Duncan had this to say concerning authorized expenditures under Section 501:

> "In another vein, the problem of the propriety of expense accounts under section 501 worries the union official. Traditionally in many unions, officers are granted a daily expense allowance which may be allotted irrespective of whether the union official actually expends these sums for daily expenses. It is also customary in many unions to

> grant to union officials a weekly or monthly car expense allowance. The queston arises as to whether, if the union official does not actually spend the amount allotted for these purposes, said union officer is breaching his fiduciary duty to the members. A similar problem arises when a union car is driven for personal use. Strictly speaking, when a fiduciary expends money for non-union purposes he is liable to account, but this does not answer the question. It is no trade secret that as standard practice corporate officers, who are also fiduciaries, use company expense accounts and company automobiles and airplanes, and sometimes in a rather lavish manner. *If these expenses are authorized by the company charter, bylaws or resolution, no particular problem arises. Such expenses are, in effect, an increased emolument of office, added salary if you will, and so long as this is understood by all parties concerned, no question as to their propriety will arise. In the case of unions, such expenditures would seem to be legal and proper so long as it is clear that authority can be found for such expenditures in the union constitution, bylaws or legitimate resolutions of the governing body and it is so understood by the union membership."* [48 Georgetown L.J., p. 296, 1959. Emphasis added.]

Whether we are talking about expense accounts or whether we are talking about pension or severance plans, since they are both considered compensation for services rendered or to be rendered, where they are authorized by the governing rules of the local union there can be no unlawful conversion or embezzlement, since the appropriation was with right, with consent of the owner.

This is certainly what the then Senator Kennedy,* a leader in Congress on passage of labor reform legislation, had in mind when he stated during debate on its passage, and with particular reference to Section 501:

> "The bill does not limit in any way the purposes for which the funds of a labor organization may be expended or the investments which can be made. Such decisions should be made by the members in accordance with the constitution and by-laws of their union. *Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and by-laws, or by a resolution of the executive board, convention or other appropriate governing body—including a general meeting of the members—not in conflict with the constitution and by-laws."* [105 Cong. Rec. 16415 (daily Ed. Sept. 3, 1959). Emphasis added.]

From the uncontradicted evidence in the case at bar, appellants with the approval of the executive board, had full authority to fix the salaries and wages of the union officers and other paid employees. They exercised this function under the authority granted them by the By-Laws of the Local Union in creating the severance fund. How could the jury lawfully reach a conclusion that these funds were converted from the union treasury wrongfully under such circumstances?** The complete lack of evidence to support this essential element, absence of consent, to sustain the conviction under Section 501(c) requires a reversal of the judgment and sentence against appellants herein as to Count I.

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*Now President, to distinguish him from the other members of the Kennedy family.

**We will have more to say on this point in discussing the error of the Court in failing to give Defendants' Proposed Instruction No. 47, *infra.*

2. The Court's Refusal to Give Defendants' Proposed Jury Instruction Number 47 Constituted Prejudicial Error.

As indicated from the above analysis, the fact that the severance fund constituted wages, and that the officers and executive board had full authority under the union by-laws to establish and fix wages, was fundamental to appellants' theory of defense. For that purpose, appellants proposed the following Jury Instruction:

> "You are instructed that as a matter of law the proceeds from funds resulting from contributions made to a pension plan are when distributed a form of wages. As a result if you find from the evidence in this case that the Executive Board of Local 224 had the power in itself to set wages and conditions of employment of employees of the Union then in that event the Executive Board was empowered to provide a pension plan and that they did not have to go to the general membership for that purpose.
>
> "Therefore if you find from the evidence in this case that the Executive Board alone set up a pension plan for payment at severance of employment to the paid employees this was doing only what they had a right to do." [Clk. Tr. p. 181.]

This instruction was refused by the court. Under the decisions and analysis on this point, *supra,** it can be seen that this was a proper instruction, based upon the uncontradicted facts in the case at bar that the severance

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*Point I, p. 43. See *Hooker v. Hoey,* 27 F. Supp. 489, 490 (D. C. N. Y. 1939); *Glandzis v. Callincos,* 140 F. 2d 111, 113 (2nd Civ. 1944); *Kennet v. United Mine Workers of America,* 183 F. Supp. 315, 317 (D.C. 1960); *Carter v. United States,* 353 U. S. 210, 220, 77 S. Ct. 793, 1 L. ed. 2d 776 (1957).

fund was compensation, additional wages. The prejudice to appellants is obvious, since the jury must have considered the severance fund as something other than wages in order to find them guilty of embezzlement and larcency. At no time during the trial was it ever contended by the government that appellants did not have the authority as officers of the union, with the approval of the executive board, to fix the wages and salaries of the paid officers and employees of the Union. Under these circumstances and as a fundamental principle of law requiring the trial court to instruct on every phase of a defendant's defense no matter how weak, it was the District Court's duty to instruct the jury as requested in Defendants' Proposed Instruction No. 47. Here the evidence as summarized in this instruction was not weak, but was strong and uncontradicted. Therefore, failure to give this instruction, the heart of appellants' theory of defense, constituted prejudicial error.

3. The Evidence Is Insufficient to Show Any Fraudulent Intent on the Part of Appellants as to Count I, Because the Moneys Were Appropriated Openly and Under a Bona Fide Claim of Right.

Fraudulent intent is a necessary and essential part of the government's proof of unlawful conversion under Section 501(c) of the Landrum-Griffin Act. [*Taylor v. United States,* 320 F. 2d 843 (9th Cir. 1953).] It is appellants' position that the evidence is insufficient in that the jury could not properly infer the necessary fraudulent intent on the part of appellants in their participation in the creation of and dissolution of the severance fund, from isolated facts and ignore the facts that what they did was done openly and under a *bona fide* claim of right which is entirely consistent with their innocence and lack of fraudulent intent.

The general rule is succinctly set forth in Clark and Marshall on Crimes at page 729:

> "Nor is a man guilty of larceny in taking another's property under a bona fide claim of ownership or right however unfounded the claim may be in law."

As previously indicated under Point I *supra,* under the by-laws of the Local Union, the secretary-treasurer and president together with the approval of the executive board were vested with the authority to determine wages. Appellants, together with the other members of the executive board, including the rank and file members who had an equal voice in all of the actions of the executive board, exercised this authority in creating and subsequently dissolving the severance fund. Every action taken by the executive board was clear-cut, publicly announced, recorded in the minutes which were offered and received in evidence in the government's case. While it was not essential to bring these matters to vote at the general membership meeting, it was the practice of this Local Union to require that the minutes of the executive board be read and approved by the general membership. Furthermore, the minutes to the executive board and the general membership meeting were open to inspection* by the general membership at any time during regular office hours. The severance fund account at the bank was clearly labeled and held as a "Severance Fund Local Line Drivers Union 224". Each check was endorsed as payable to the "Severance Fund, Local Line Drivers Union 224".

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*See *Moody v. Bartenders Union Local No. 284,* 48 Cal. 2d 841, 313 P. 2d 857 (1959).

The question of the sufficiency of the evidence to support a conviction under Section 501(c) has come to the attention of our courts on two occasions, once in *Taylor v. United States,* 320 F. 2d 843 (9th Cir. 1963) before this Circuit, and in an earlier decision in the 6th Circuit, *Doyle v. United States,* 318 F. 2d 419 (1963). Both of these cases are clearly distinguishable from the case at bar in that there was ample evidence in those instances to support a conviction of embezzlement under this section.

As is often the case, there is never any direct evidence of intent. The same must be inferred from the manner in which the conversion occurs and from the other facts presented in the case. [See *Morrisette v. United States,* 342 U. S. 246, 72 S. Ct. 240, 96 L. ed. 288 (1952).] Even assuming that there is some shred of evidence on which a fraudulent intent could be inferred, the jury could not ignore, nor can this Court ignore, the overwhelming evidence that in this case the transfer of the Union funds was done under a *bona fide* claim of right and was completely open and aboveboard.

This absence of proof of fraudulent intent at the close of the government's case, was one of the bases upon which appellants moved for acquittal as to Count I. [R. Tr. p. 1124, line 9, to p. 1125, line 1.] The Court denied Appellants' motion, and the jury found against them on this issue. This, appellant contends, is contrary to the evidence, even when weighed in a light most favorable to upholding the verdict, for there cannot be on one hand substantial evidence to sustain the

verdict, and on the other a reasonable hypothesis drawn from the same evidence, pointing to the innocence of a defendant. As stated in *Seals v. United States,* 221 F. 2d 243 (8th Cir. 1955), in which the court was concerned with the sufficiency of the evidence to support a conviction under Title 18 United States Codes, Section 656, dealing with embezzlement by bank officials:

> "The general rules as to the matters to be considered in passing on motions for acquittal appear to be well established. After verdicts of guilty, in reviewing orders overruling motions for acquittal, the appellate court is required to view the evidence in the light most favorable to the Government, and must give the Government the benefit of all inferences that may reasonably be drawn from the evidence. Appellate courts do not weigh the evidence or determine the credibility of witnesses. 'Egan v. United States, 8 Cir., 137 F.2d 369'; 'Miller v. United States, 8 Cir., 138 F.2d 258'; 'Jensen v. United States, 8 Cir., 213 F.2d 781'. In United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S. Ct. 811, 84 L.ed. 1129, the Court holds that the motion for acquittal requires an examination of the record, not for the purpose of weighing the evidence, but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. In United States v. Gasomiser Corp., D. C. 7 F.R.D. 712, 718, the court states:
>
> " '*This then being a criminal case based upon circumstantial evidence, in order for the motions of the defendants to be denied guilt must be the only reasonable hypothesis from such evidence.* If there is any other reasonable hypothesis, although admittedly guilt may also be a reasonable hypothesis, then the defendants are entitled to judgments

of acquittal. In this circuit, it is clear that *"In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt"*'. . . .

"In Gargotta v. United States, 8 Cir., 77 F.2d 977, at page 981, this court stated:

" 'This court has frequently announced and committed itself to the rule: *"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error."* . . .'

"Viewing the evidence in the light most favorable to the Government and giving it the benefit of all reasonable inferences, we are convinced by the entire record that there is no substantial evidence to warrant a finding of intent on the part of the defendant Seals to injure or defraud the bank. *It appears to us that the evidence is at least as consistent with innocence as it is with guilt.* The trial court erred in overruling the defendant Seals' motion for judgment of acquittal made at the close of all the evidence, and by reason thereof this case must be reversed." [221 F. 2d at pp. 249, 250 (Emphasis added).]

Certainly the same thing could be said with respect to the evidence concerning fraudulent intent in the case at bar.

The Jury was not given the opportunity to consider the evidence in light of this fundamental rule of law, since the District Court refused Defendants' Proposed Jury Instruction No. 38. [Clk. Tr. p. 175.] This we

submit was prejudicial error. Certainly if the appellate courts are bound to consider the sufficiency of the evidence in light of this basic principle, the jury must also weigh the evidence with this same principle in mind.

The most striking feature of the government's case under Count I is that in order to sustain a prosecution and conviction under Section 501 (c), the government must concede that initially the severance fund was created legally and that at that point in time, appellants did not have the necessary fraudulent intent to wrongfully appropriate the insurance refund checks. For as previously indicated under Point I, if appellants acted with fraudulent intent in creating the severance fund and depositing the insurance refund checks into the severance fund account, they committed at that time an act of embezzlement or theft. Section 501 (c) was not law, and the Federal Courts had no jurisdiction to try appellants for a crime under a law which was not even in force at the time the alleged criminal offense was committed. Therefore, in order to confer jurisdiction on the District Court to try and punish defendants for the alleged embezzlement, one must assume first, that title to the insurance refund checks did not pass to the trustees from the Union under the severance trust agreement, and secondly, and more significantly at this point in our Argument, that in its inception the severance fund was legal and appellants, as officers and members of the executive board, acted without any fraudulent intent in participating in the creation of the severance fund. In order to comply with the basic common law principle that there must be a concurrence of act and intent, the government must concede that the initial appropriation was with right, and that only when appellants acted to dissolve the severance fund and distribute the proceeds to the beneficiaries under the trust agreement, did they unlawfully and fraudulently misappropriate moneys belonging to the union.

In answer to this contention, we ask this question. If the severance fund was legally created in its inception, and appellants acted at that time without any fradulent intent where in the record is there any evidence from which fraudulent intent can be inferred in dissolving the severance fund in the manner that it was done, and distributing the proceeds as wages to the beneficiaries of this fund under the Trust Agreement?

The record clearly shows that the only thing that appellants did in dissolving the trust fund and distributing the proceeds to the beneficiaries, was to seek advice of counsel, Mr. Perkins, as to whether or not this could be legally done. Mr. Perkins testified that he advised appellant Woxberg that this could be legally done [R. Tr. p. 1848, line 7, to p. 1850, line 8], and the severance fund was dissolved. [Ex. G.]

How can appellants be convicted of embezzlement or theft when the evidence is uncontradicted that they acted in good faith upon advice of counsel and upon at least a *bona fide* claim of authority vested in them under the By-Laws of the Local Union in fixing and determining their salary and wages? This evidence, we submit, points only to the reasonable hypothesis that appellants' conduct was completely and unequivocally consistent with their innocence, and in no way inferred that they acted with fraudulent intent.

In conclusion to our Argument under Point I, we draw this Court's attention to the fact that these appellants were members of the Teamsters' Union, which union and some of its officials have come under strong criticism from the public through widespread publicity. It is obvious that the government and the jury concluded that appellants took unfair advantage of their authority to fix salaries in creating the severance fund. This may or may not, however, constitute a breach of faith and a violation of their fiduciary duties estab-

lished under Section 501(a) of the Landrum-Griffin Act. This may or may not give rise to a civil action by the Union or the members of the Union in absence of Union action (Section 501(b)) to recover these moneys on a basis of a breach of fiduciary duty. But the District Court and the jury, through lack of adequate instruction on this matter, lost sight of the fact that not every breach of a fiduciary duty under Section 501(a) constitutes criminal conversion under 501(c).

In support of this position, we call the Court's attention to the legislative history surrounding the enactment of the Landrum-Griffin Act, and in particular Sections 501(a)(b) and (c). For example, during debate on passage of this Bill, Senator Goldwater stated:

> "The House Bill (which contained similar sections on the fiduciary duty and the requirements of reporting of union officers and employees as the final bill that was subsequently passed) makes it clear that members may sue for violations of all fiduciary duties imposed by the Bill, not just theft, embezzlement and unlawful conversion as provided in the Senate Bill." [105 Cong. Rec. 15120 (Daily ed. Aug. 20, 1959).]

Of even more significance which clearly indicates that it was the intent of Congress to make the fiduciary duty of the union officials in reporting and handling of union funds and property much broader under Section 501(a) than the criminal responsibility as imposed under Section 501(c), we refer again to the then Senator Kennedy's statement:

> ". . . Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon

> them either by the constitution and by-laws, or by a resolution of the executive board, convention or other appropriate governing body—including a general meeting of the members—not in conflict with the constitution and by-laws." [105 Cong. Rec. 16415 (Daily Ed. Sept. 3, 1959).]

With this understanding of the scope of Section 501(a), it could be argued that even in a civil action appellants here would not be held guilty of a breach of trust, since the expenditures were within the authority conferred upon them by the By-Laws of the Local Union. At most, it could be argued that they overstepped the bounds of discretion and abused their salary fixing powers. Such a civil action by members of the union or by the union itself under Sections 501(a) and (b) of the Landrum-Griffin Act would be comparable to actions by stockholders or the corporation against members of the board of directors or its officers who have excessively compensated themselves for services rendered (see for example, *Winkleman v. General Motors Corp.*, 39 F. Supp. 826 (S. D. N. Y. 1940).) In such civil actions, the question to be determined is the reasonableness of the compensation as fixed. This is a lot different, however, from the requirement in criminal prosecutions for conversion and embezzlement, to show that the same was done with fradulent intent and without the consent and permission of the owner.

Since the evidence is wholly insufficient to show either the existence of fradulent intent on the part of appellants or to negate consent by the Union to the creation and dissolution of the severance fund, the convictions under Count I must be set aside.

III.

The Evidence Is Insufficient to Show Any Fraudulent Intent on the Part of Appellants With Respect to Count II.

The government's allegations under Count II was predicated upon the theory that appellants in their fiduciary capacity as members of the executive board, unlawfully and with the intent to defraud the Union, improperly authorized the payment of $220.00 by a Union check to Larry McBride for services rendered by him to the severance fund trust on the occasion of its dissolution.

The circumstances relied upon by the government to support such a theory were:

(a) No services were performed by McBride for or on behalf of the Union, but instead were performed by him for and on behalf of the severance fund trust;

(b) The dissolution agreement, Exhibit G in paragraph 2 thereof, provided "the net assets of the trust after paying any trust expenses, including attorneys' fees and any other expenses of winding up shall be distributed by the trustees to the present beneficiaries . . ." and therefore, the payment of the $220.00 to McBride for the dissolution audit and other services performed by him was not a proper charge to the Union;

(c) The use of the words "arbitration audit" in the upper left-hand corner of the check for $220.00, Exhibit 2, payable to Larry McBride, was false and used as a means to cover up the true nature of the expenditure;

(d) The monthly Union expense sheets approved by the executive board contained the same notation "arbitration audit," hence when approved by them disclosed knowledge and acquiescence on their part of this improper and unlawful expenditure;

(e) With knowledge of such facts, appellants used $220.00 of funds belonging to the Union with the intent to defraud for a purpose inconsistent with the execution of their trust.

At the outset, we incorporate herein our argument under Count I that the severance fund was a duly established form of compensation for the paid employees of the Union. The Union, therefore, had a continuing duty to see to it that the funds contained therein were distributed to the employees as a "gross" amount. Thus when the Union paid Mr. McBride the sum of $220.00 for services rendered by him in making the audit and the distribution of the assets of the severance fund it was a lawful and proper Union expenditure under the law, and not embezzlement or theft under Section 501 (c).

In *United States v. Carter,* 353 U. S. 210, 77 S. Ct. 793, 1 L. ed. 2d 776 (1957) the Court was faced with a generally similar situation. This was a civil action by the trustee of a health and welfare fund for employees against a bonding company covering a contractor who had contributed to the fund as required by the collective bargaining agreement. This action was filed under the Miller Act. The Court held these funds were a part of the employees' compensation and justly due them the same as wages paid in cash. More significantly, the Court held that the trustees were entitled to have the bonding company pay liquidating damages, attorneys' fees, court costs and other related expenses of litigation. "If the employees are to be 'paid in full' the 'sums justly due' to them, these items [attorneys fees and expenses] must be included." [353 U. S. at p. 220. Bracketed material added.] Thus, the *Carter* decision holds that where moneys are placed in trust for the benefit of employees, the trustees of the fund have the right and duty to sue for the benefit of said employees

and to recover not only the funds which are the subject of the suit but for the costs of recovery. It therefore follows that the employees can recover and are entitled to the moneys due them without deducting expenses. This is what happened in the case at bar.

In the payment to Larry McBride for services rendered in auditing and distributing the assets of the severance fund, a service to the Union was rendered in providing for the protection of its members in seeing that the funds were properly distributed in accordance with the respective services of each of the beneficiaries. It would certainly seem ironical if the employees were required to pay the expenses of securing their own wages or compensation. Certainly neither the Landrum-Griffin Act nor any other form of established law intended that individual employees or beneficiaries would have to pay personally for the administration of receiving compensation owed to them. It was a Union duty to see that these recipients received full compensation.

It therefore follows:

(a) Larry McBride's services were performed by him for and on behalf of the Union, notwithstanding they benefited the severance fund trust and the beneficiaries thereof;

(b) The dissolution agreement providing for the payment of trust expenses did not relieve the Union from its obligation to pay this amount;

(c) Assuming the charge of $220.00 could properly have been an obligation of the severance fund trust on dissolution, it does not follow that it is an improper or unlawful charge to the Union;

(d) If title to the funds alleged to have been stolen or embezzled was in the "Union" as alleged in the indictment and contended by the government in Count I,

certain it is that the expenditure of the $220.00 was a proper charge to the Union. The government cannot in one breath contend that appellants embezzled approximately $35,000.00 from the Union and the next breath contend that title to the $35,000.00 was lawfully in the "severance fund trust," and therefore appellants are guilty of charging $220.00 to the Union for and on behalf of the "severance fund trust";

(e) There was no evidence in the record sufficient to overcome the presumption of innocence and the uncontradicted testimony that the use of the words "arbitration audit" were other than a mistake or misunderstanding on the part of Mrs. Dorothy Johnson, the bookkeeper, who wrote the words "arbitration audit" on the check and typed the monthly expense sheets using the same words "arbitration audit," which were approved routinely by the executive board;

(f) Finally, as was said in the case of *Seals v. United States,* 221 F. 2d 243 at p. 250 (Point II at p. 58 *supra*):

> "It appears to us that the evidence is at least as consistent with innocence as it is with guilt."

So, here, it appears that viewing all of the evidence in its most favorable light to the government, it is at least as consistent with innocence as with guilt and requires a reversal.

Here as in Point II *supra,* the District Court erred in refusing to give Defendants' Proposed Jury Instruction No. 38 [Clk. Tr. p. 175] which deprived the jury of the opportunity to consider the evidence in light of this basic principle. Failure to give this instruction, the heart of the concept of reasonable doubt, constituted prejudicial error. For these reasons the conviction under Count II must be set aside.

IV.

The Evidence Is Insufficent to Show Any Taking or Fraudulent Intent on the Part of Appellant Woxberg to Sustain the Convictions Under Counts IX and X.

This portion of the brief applies only to appellant Woxberg, as appellant Dykes was found not guilty as to these allegations.

In order to constitute the crime of embezzlement or stealing, or the like, there are two principal ingredients, *i.e.,* a taking and an evil intent. [Clark & Marshall, Crimes, p. 800, Sec. 12.19; p. 803, Sec. 12.21 (6th ed. 1958).] The evidence as produced in the trial indicates that there was neither a taking nor evil intent on the part of appellant Woxberg.

The Union has established as a method of doing business, the pattern of advancing certain costs and expenses for members and paid employees and then in turn receiving reimbursement for same. An examination of the books of the Union under Exhibit 41, wherein the advances on the behalf of appellant Woxberg were listed under "Expenses Paid to Creditors," indicates this method. In addition, Exhibit 41 must be read in conjunction with Exhibit 42, which is entitled "An Expense Analysis." These records disclose that the books and records of the Union make a full revelation of the jeep transaction and it could not have been a theft on the part of appellant Woxberg, but rather an existing debt for these moneys on the books and records of the Union. There can be no taking, as when notified by the Union to make payment for said debt appellant Woxberg immediately forwarded the requested amount to the Union. [R. Tr. p. 985, line 9, to p. 986, line 21.] The only argument left for the government to pursue is that these actions constituted an "intent" to

steal. This is clearly offset by the full disclosure of the entire transaction in the records of the Union. There was no subterfuge or concealment of this fact, as indicated by appellant Dykes and Mrs. Johnson. Mrs. Johnson, the bookkeeper, made all the entries to constitute a record of same in the books of the Union. At the time of the payment to Frank's Automotive Service by the Union on behalf of appellant Woxberg, appellant Dykes announced to the executive board that said payment was on behalf of appellant Woxberg and that he (Woxberg) would take care of same when he returned to town. [R. Tr. p. 2015, lines 3-11.] It might be considered that this advance on behalf of appellant Woxberg was of such an isolated nature and so contrary to the past pattern of business exercised by the Union to indicate some wrong doing. However, the facts are just the opposite as the evidence indicates a constant tradition of the Union making advances on the part of employees and members over a long period of time and then receiving reimbursement from them. Exhibits 74 and 75 indicate that the Union had conducted its business over a period of years in a fashion in which the matter of reimbursement from officers, members and others was a matter of common practice.

This method of doing business has to be taken into consideration as it negates any intent to defraud the Union of any moneys whatsoever by appellant Woxberg. The Union advanced the moneys on his behalf; when notified of his debt, appellant Woxberg reimbursed the Union immediately. It is obvious that the only reason that a payment was not made earlier by appellant Woxberg was the fact that he did not receive a bill until later. He was not present around the Union headquarters at the time of the payment by the Union. When he did receive notification from

appellant Dykes, through the letter of March 21, 1962 [Ex. N], he immediately made said payment. Exhibit 57, which were Union Federal Tax Exemption forms, showed that one of the Union income items was "reimbursement". This further fortifies the showing that this method of advance and reimbursement was an accepted method of doing business as revealed to the government. It is obvious that appellant Woxberg took no funds from the Union. It is obvious that he never had any intent to take funds from the Union, as exhibited by the many entries in the Union records indicating this advance as a debt of appellant Woxberg to the Union, which, in fact, he did pay.

In further deference to the fact that appellant Woxberg had no part in any alleged wrongdoing is the result of the trial itself on this issue with respect to appellant Dykes and defendant Hester. Appellant Dykes was the only party to have any contact with Mr. Whipple, the party doing the work on appellant Woxberg's jeep at Frank's Automotive Service. [R. Tr. p. 784, line 15, to p. 789, line 13.] It was appellant Dykes who made all the arrangements for the jeep repair. It was appellant Dykes who arranged for the Union advance on behalf of appellant Woxberg. [R. Tr. p. 2015, lines 3-11.] It was appellant Dykes and defendant Hester who signed the Union checks for the jeep repair which stated on the face "automotive repairs, H. L. Woxberg". [Exs. 9 and 10.] Appellant Woxberg had no contact with this situation other than owning the jeep, telling appellant Dykes to "send me a bill" and finally reimbursing the Union for its advance. [R. Tr. p. 1393, line 10, to p. 1395, line 22; Exs. N, M.]

Under 501(c) one can be guilty of embezzlement when he takes property of the union for the "use of another". Hester and appellant Dykes were the only actors with respect to these charges. If there was any

taking, they did it for Woxberg's benefit. Yet appellant Dykes and defendant Hester were found not guilty of these counts.

In accord with the weight of evidence in this case, and as stated in *Gargotta v. United States,* 77 F. 2d 977 (8th Cir. 1935) at page 981:

> " 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error.' "

Here again, as in Point II *supra,* the District Court erred in refusing to give Defendants' Proposed Jury Instruction No. 38 [Clk. Tr. p. 175] covering this basic principle.

Conclusion.

Based upon the foregoing, the convictions of appellants as to Counts I, II, IX and X should be set aside.

Respectfully submitted,

ROBERT A. NEEB, JR.,
Attorney for Appellant Woxberg,
GRANT B. COOPER,
Attorney for Appellant Dykes.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

Robert A. Neeb, Jr.
Grant B. Cooper

APPENDIX.

Exhibits Offered and Received in Evidence

Exhibit	Identified	Received in Evidence
1	19	120
2	19	170
9	19	798
10	19	798
29	15	15
30	15	15
31	15	15
32	15	15
41	19	862
42	19	862
43	19	276
44	19	276
57	94	439
61	312	312
74	906	910
75	927	927
E	278	278
G	323	329
M	981	981
N	983	985
X	1741	1781
Y	1743	1781
Z	1744	1781

No. 18805

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United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 18805

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APPELLEE'S BRIEF.

I.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The prosecution in the courts below was based upon a twenty count indictment returned by the Federal Grand Jury for the Southern District of California on September 5, 1962, which charged in substance that on twenty occasions occurring during 1959, 1960 and 1961, Homer L. Woxberg, Sr., Wayne Franklin Dykes, Donald V. Hester and Hobart A. Barnes, wilfully embezzled, stole, abstracted and converted to their own use and the use of others money, funds, securities, property and assets of Line Drivers Local 224 of the Teamsters Union, in violation of Section 501(c) of Title 29, United States Code. Appellant Woxberg was named in Counts One through Nineteen. Appellant Dykes was

named in Counts One through Twenty. The co-defendant Hester was named in Counts One through Seven, and Nine through Fifteen. The co-defendant Barnes was named only in Counts One, Two, Sixteen, Seventeen and Eighteen [C. T. 2].[1]

On October 8, 1962, the defendants each entered a plea of not guilty to each count [C. T. 4]. On February 5, 1963, after numerous pre-trial motions [C. T. 24-25] trial by jury commenced before the Honorable Harry C. Westover, United States District Judge [C. T. 100].

After approximately six weeks of trial each of the defendants, Woxberg, Dykes, Hester and Barnes, was found guilty as to Counts One and Two of the Indictment. In addition the appellant Woxberg was found guilty as to Counts Nine and Ten of the Indictment [C. T. 195-196].

On April 8, 1963, appellants Woxberg and Dykes were each sentenced to the Custody of the Attorney General for three years on each Counts One and Two, such sentences to run concurrently; they were made eligible for parole pursuant to 4208(a)(2) and fined $10,000 on Count One and $1,000 on Count Two. Woxberg was also fined $1,000 on each Counts Nine and Ten [C. T. 208-209].

On April 10, 1963, the appellant Woxberg filed a timely notice of appeal. On April 15, 1963, the appellant Dykes filed a timely notice of appeal. Co-defendants Hester and Barnes elected not to appeal their convictions [C. T. 214, 217].

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[1]C. T. refers to Clerk's Transcript of Proceedings.

The jurisdiction of the United States District Court for the Southern District of California was based upon Section 501(c) of Title 29, United States Code, and Section 3231 of Title 18, United States Code.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294 of Title 28, United States Code.

II.
Statutes Involved.

Section 501(a) of Title 29, United States Code provides as follows:

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and to expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization

or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Section 501(c) of Title 29, United States Code, provides as follows:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

III.

Statement of the Case.

A. Questions Presented.

Appellants in their consolidated brief set forth lengthy specifications of error. Reduced to their simplest form the errors asserted lend themselves to classification as follows:

1. Asserted insufficiency of evidence to sustain the verdicts of guilty on Counts One, Two, Nine and Ten.
2. Asserted errors in instructions given and refused.

The questions presented by this appeal are the following:

1. Was there sufficient evidence to support the factual determination that the Severance Fund which was the subject of Count One of the Indictment, was money, funds, securities, property

or assets of Local 224 at the time it was distributed by appellants to themselves and others?

2. Was there sufficient evidence to support the factual determination that the distribution of the Severance Fund by appellants to themselves and others was criminal conduct as charged in Count One of the Indictment and as such prohibited by Section 501(c) of Title 29, United States Code?
3. Was there sufficient evidence to sustain the convictions of appellants as to Count Two of the Indictment?
4. Was there sufficient evidence to sustain the conviction of appellant Woxberg as to Counts Nine and Ten of the Indictment?
5. Was there prejudicial error in the giving or refusing of instructions?

The brief filed by appellants appears primarily directed at their conviction on Count One of the Indictment. In that count appellants and their co-defendants were charged in substance with the unlawful taking of the so-called "Severance Fund" ($35,178) on November 2, 1959. The principal thrusts of appellants' attack on this count appear to be:

1. The Severance Fund was taken with the consent of the union as wages. Therefore there was insufficient evidence of a wrongful taking prohibited by Section 501(c) of Title 29, United States Code.
2. The Severance Fund was wrongfully taken from the union prior to a time when such taking was a federal offense. Therefore there was insufficient evidence of a wrongful taking prohibited by Section 501(c) of Title 29, United States Code.

3. The Severance Fund was wrongfully taken from a trust fund and not the union. Therefore there was insufficient evidence that the Severance Fund was money, funds, securities, property and assets of a labor organization.
4. The Severance Fund was wrongfully taken from the union but it was taken in good faith. Therefore there was insufficient evidence of the requisite intent.

IV.

Statement of Facts.

A. Preliminary Statement.

The scope of review necessary to determine the questions raised by this appeal has been limited by the discriminate verdicts returned by the jury.

The twenty count indictment alleged violations of Section 501(c) of Title 29, United States Code, which can be summarized briefly as follows: (1) Count One involved the taking of the so-called "Severance Fund". Count Two involved the payment by Local 224 of the expenses of winding up and distributing this fund. These counts are involved in this appeal. (2) Counts Three through Eight involved transactions where it was asserted that union funds were expended at a discount house, Atlantic Sales and Service to purchase a washer, freezer, tea kettle and an electric frying pan for the personal use of appellant Woxberg. These counts are not involved in this appeal. (3) Counts Nine and Ten involved the payment of union funds to Frank's Automotive Service for the mechanical reconstruction of appellant Woxberg's jeep. These counts are involved in this appeal. (4) Counts Eleven through Eighteen in-

volved expenditures of union funds in the purchase of mortgage redemption life insurance policies which accrued cash values for the benefit of appellant Dykes and co-defendants Hester and Barnes. These counts are not involved in this appeal. (5) Counts Nineteen and Twenty involved the taking of a union owned Cadillac by the appellant Woxberg and a union owned Buick by appellant Dykes. These counts are not involved in this appeal.

The trial in the court below required approximately six weeks and is reported in over 2,800 pages of transcript. For the purpose of orientation and identification only, the appellee submits the following list of all of the witnesses who testified during the trial and the subject matter of their testimony:

Homer L. Woxberg, appellant. Woxberg was the principal executive officer of Local 224 (1943 through 1961). Served as Secretary-Treasurer of Local 224 and member of Executive Board (1947 through 1961). Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1949 to 1960). Asserted trustee and member of Severance Fund. Signed checks drawn on Severance Fund bank account (1955 through 1959). Received $9,216.67 in cash and trust deeds from severance fund. Members of Security Fund Partnership.

Woxberg testified in his own defense [R. T. 1188 to 1803].[2]

Wayne Franklin Dykes, appellant. Dykes came to Los Angeles from Denver with Woxberg in 1943. Employed by Woxberg as a Business Agent for Local 224

[2]R. T. refers to Reporter's Transcript.

(1943 through 1962). Served as President of Local 224, member of its Executive Board and sometimes acting Recording Secretary (1947 through 1962). Acted as principal executive officer Local 224 in 1962. Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1949 through 1962). Asserted trustee, member of Severance Fund and signed checks drawn on the Severance Fund bank account (1955 through 1959). Received $9,216.68 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Dykes testified in his own defense [R. T. 1928 to 2211].

Donald V. Hester, co-defendant. Convicted but not appealing. Employed as a Business Agent for Local 224 (1947 through 1962). Served as trustee of Local 224, member of its Executive Board and sometimes acting recording secretary (1947 through 1962). Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1954 to date). Asserted trustee, member of Severance Fund and signed checks drawn on the Severance Fund bank account. Received $6,824.57 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Hester testified in his own defense [R. T. 2398 to 2463].

Hobart Anson Barnes, co-defendant. Convicted but not appealing. Employed as a Business Agent for Local 224 (1950 to 1962). Served as trustee of Local 224, member of its Executive Board (1950 through 1962). Member of Western States Teamsters Retirement Plan 1954 to date. Asserted member of Severance Fund.

Received $5,311.91 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Barnes testified in his own defense [R. T. 2219 to 2354 and 2364 to 2391].

Sidney E. Wassen. Employed by Local 224 as an organizer (September 3, 1955). Appointed Secretary-Treasurer 1962 while Dykes assumed duties of Principal Executive Officer. Received $2,356.94 in cash and trust deeds from the Severance Fund distribution.

Testified regarding Severance Fund and missing union financial records [R. T. 341 to 378, 384 to 426, and R. T. 1894 to 1901].

Joseph McBride. Employed as an organizer by Local 224 (November 1, 1955). Received $2,251.40 in cash and trust deeds from Severance Fund distribution.

Testified regarding Severance Fund [R. T. 232 to 340 and R. T. 381 to 384].

George G. McConachie. Appointed then later elected (non writing) Recording Secretary and rank and file member of Executive Board Local 224 (1952 through 1961).

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 2543 to 2558].

Clarence M. Layman. Twice appointed rank and file trustee of Local 224 by Executive Board (1955 to 1957 and 1958 to 1962).

Testified regarding his attendance at Executive and general membership meetings [R. T. 208 to 520 and 525 to 585].

Charles M. French. Appointed rank and file trustee by Executive Board (1960-1962).

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 3532 to 3543].

Clyde W. Yandell. Secretary-Treasurer and principal executive officer of Local 224.

Custodian of records kept by Local 224 in the regular course of business. Testified regarding his attendance at general membership meetings [R. T. 427 to 503 and R. T. 1337 to 1347].

Keith Ottesen. Elected to Executive Board Local 224 in 1962.

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 585 to 626 and R. T. 2671 to 2674].

Dorothy N. Johnson. Office manager Local 224 (1957 to date). Secretary and kept accounting records for local.

Testified regarding records and office procedures [R. T. 859 to 1089 and R. T. 2590 to 2599].

Maxine Butler. Clerk employed in Local 224's office (1949 to date of trial).

Testified regarding office and procedures [R. T. 504 to 507].

Joe Ivan Carl, rank and file member of Local 224.

Testified regarding general membership meetings. Also took notes at the meetings [R. T. 691 to 778 and 1347 to 1354].

Fred Connelly, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 2578 to 2589].

William Logan, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 627 to 657 and R. T. 662 to 691].

William Lukrafka, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 2563 to 2569].

E. C. Ellyson, rank and file member of Local 224.

Testimony regarding his attendance at general membership meetings read into records [R. T. 2656 to 2663].

Norman F. Nordin. Assistant to the auditor and custodian of business records of Occidental Life Insurance Co.

Testified regarding Local 224's group insurance policy and the Experience Rating Refunds made to the local [R. T. 7 to 40].

Ira L. Browning. Custodian of business records of Occidental Life Insurance Co.

Testified regarding the Western States Teamsters Retirement Plan covering union officers and business agents [R. T. 671 to 691].

Richard A. Perkins. Attorney and neighbor of appellant Woxberg.

Testified regarding his legal services in connection with the Severance Fund [R. T. 1803 to 1888 and 1902 to 1927].

Laurence McBride. Real estate broker and mortgage loan broker.

Testified regarding his services in connection with the Severance Fund [R. T. 97 to 227].

Grant C. Earl. Special Agent, Federal Bureau of Investigation.

Testified regarding his schedules and summaries prepared for the trial [R. T. 1090 to 1121].

Frank Whipple, proprietor of Frank's Automotive Service.

Testified regarding his services in reconstructing appellant Woxberg's jeep [R. T. 780 to 790 and R. T. 796 to 810].

John C. Curtis, Insurance man [R. T. 2464 to 2531].

Raymond T. Rodriguez, Insurance man [R. T. 41 to 82].

Lenore Humphrey, secretary (to Al Burney who died during the trial) at Atlantic Sales and Service.

Testified about business records at Atlantic Sales and Service [R. T. 810 to 858 and R. T. 2667 to 2671].

J. V. Hicks. Accountant. Testified regarding Atlantic Sales and Service [R. T. 2599 to 2655].

Joseph R. Zazueta, Certified Public Accountant retained by Atlantic Sales and Service [R. T. 2665 to 2671].

Carlos M. Teran. Friend of appellant Woxberg and Al Burney of Atlantic Sales and Service [R. T. 2355 to 2364].

B. Counts One and Two.

Linedrivers Local 224 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 402(i) of Title 29, United States

Code [R. T. 531]. The local came into existence in 1943 and after completing a successful trusteeship was chartered in 1947 [R. T. 1190].

The general membership of Linedrivers Local 224, which included some 2500 to 2600 men, met regularly on the 4th Sunday of each month except during the summer months of June, July and August. [R. T. 1549]. The general membership meetings were held in the union hall which could accommodate approximately 200 [R. T. 396, 1549]. Most meetings were attended by only 50 to 100 members [R. T. 287, 1543 and 1546]. Monthly dues of $8.00 were paid by each member [R. T. 390].

Local 224 was governed by an Executive Board which met in the morning at the office of the local on the 4th Sunday of each month, just prior to the general membership meetings [R. T. 865]. Beginning in October of 1959 after the effective date of the Landrum Griffin Act, the Executive Board met specially on the first Monday of each month for the purpose of approving the miscellaneous and regular bills to be paid by the local [R. T. 865]. The rank and file members of the Executive Board were normally unable to attend this meeting [R. T. 865].

Appellants Woxberg and Dykes had been paid employees of the Teamster Union in Denver prior to coming to Los Angeles in 1943. The International Union's trustee employed Woxberg to serve as keeper of the new local. Dykes was hired as Business Agent [R. T. 2058, 2061].

Beginning in November 1947 and continuing to the date of trial Line Drivers Local 224 was governed by the following rules which were adopted at the gen-

eral membership meeting held on November 23, 1947; [Ex. 43 R. T. 1205-1206].

"(1) Election of officers shall be conducted as provided in the International Constitution, and shall be elected for the following terms of office: President, 1 year; Vice-President, 1 year; Recording Secretary, 1 year; Secretary-Treasurer, 5 years; One Trustee, 1 year; One Trustee, 2 years; One Trustee, 3 years.

(2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the Secretary-Treasurer and the President, subject to the approval of the Executive Board.

(3) All employees of Local No. 224 shall be employed and directed by the Secretary-Treasurer and President.

(4) Salary and expenses of all employees shall be set and approved by the Secretary-Treasurer and the President, subject to the approval of the Executive Board. No action shall be taken by the Executive Board or the membership meeting of Local No. 224 that in any way effects policy or expenditures of money in the absence of the Secretary-Treasurer and President.

(5) The office of Secretary-Treasurer shall be the only elective paid position of the Executive Board of the local union.

(6) In the case of a vacancy in the Executive Board of the Local, such vacancy shall be filled by the majority action of the Executive Board for the unexpired term.

(7) The Executive Board shall be empowered by the local union to conduct all the business of the local between regular meetings.

(8) It will take two-thirds (⅔) majority vote of entire membership to change the above rules."

The first election of officers resulted in Woxberg being named Secretary-Treasurer of the local and Dykes being elected President [R. T. 1193-1194 Ex. 43].

In 1949 the Western States Teamster Retirement Plan was established and during that year Woxberg and Dykes became members [R. T. 675-680]. Paid union officers and business agents were eligible to join this plan. The plan was supported by the officer's or agent's employee contributions and by a per capita tax on the membership of the officer's or agent's local and it provided $300 a month at age 65, $10,000 life insurance and a cash benefit for the individual paid officer. When terminating his participation as one covered in the plan, an officer or agent could, in substance, take the entire cash benefit created to the date of termination or take some cash plus a lesser annuity [R. T. 681]. When Woxberg terminated his participation in the plan on January 31, 1960, he received $4,135 in cash and a paid up annuity which will pay him $117.62 a month beginning in 1978 when he attains the age of 65 years [R. T. 679-680]. It should be noted that in addition to the per capita tax on the membership, Local 224 also paid all of the employee contributions to the plan through October of 1959 [R. T. 911, 1622-1625 Ex. 73].

Soon after the local was chartered Donald V. Hester and Hobart Anson Barnes became members of the Ex-

ecutive Board of Local 224. They were employed by Woxberg and Dykes as business agents for the local [R. T. 92-95 Ex. F], and on January 1, 1954 became members of the Western States Teamsters Retirement Plan [R. T. 679-680].

The following month, according to the February 28, 1954 minutes of the general membership meeting of Local 224, Woxberg made the following report:

> "He [Woxberg] explained in detail the Pension Plan proposed for the officers and office manager of the Local Union, and pointed out that those involved were requesting such a Plan in lieu of any wage increases for the next ten years. That those involved would not request a wage increase if conditions and the cost of living remained at the present level, but would not waive their rights for an increase if we went into an inflationary period. It was explained that this money would be placed in Trust in lieu of wage increases so that those involved could take advantage of the present income tax laws. It was pointed out further that those who would come under the Plan would request its abolishment if it could not be carried under our present dues structure."

Woxberg's suggestion was tabled until the next meeting when it was rejected [R. T. 1248, 1249 and Ex. 44].

Some months later Woxberg approached his neighbor Richard E. Perkins, an attorney at law, and retained him to draft an agreement [R. T. 1812-1814 and 1318-1319]. At this time and continuing through to the date of trial Local 224 paid a monthly retainer to a law firm located across the street from the local's

office. This retainer was paid based upon a per capita tax on the membership.[3] Perkins knew nothing about Local 224, but Woxberg explained what he wanted. After several drafts and several months the agreement was completed and delivered to Woxberg.

On April 4, 1955 Woxberg returned the agreement to Perkins because the name was incorrect [R. T. 1813]. Thereafter the corrections were made and the final draft was delivered to Woxberg.

The agreement was entitled *"Agreement and Declaration of Trust Severance Fund Line Drivers Local 224"* [Ex. E]. The document provided in part as follows:

> "1. *Purpose of Trust:*
>
> "(a) The membership of Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as 'Local 224', an unincorporated association, has by resolution duly adopted, voted to make contributions to a severance fund to provide a measure of security for certain paid officers and employees of Local 224 and provide benefits for them similar to some of the benefits available to employees of numerous private employers under pension, retirement, profit-sharing, and stock bonus plans;
>
> "(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with

[3]The firm of attorneys retained by Local 224 were never consulted regarding the establishment, administration and dissolution of the Severance Fund. In fact the regular Local 224 attorneys remained in complete ignorance of the fact that a Severance Fund existed or was contemplated. [R. T. 1495, 1496].

such other monies as may be designated for that purpose in future; and . . .

"11. *Covered Employment:* As used herein for purposes of identifying the beneficiaries hereunder and determining eligibility to receive benefits (subject to the provisions hereof) the term 'covered employment' means employment after the qualifying period in one of the following paid offices and positions with Local 224: Secretary-Treasurer, Business Agent, and Office Manager. The term 'covered employee' means an individual in covered employment. At the date of this agreement the qualifying period shall be three years of continuous service in such paid office or position with Local 224 prior to the date of this agreement. As to any person who qualifies after the date of this agreement, the qualifying period shall be at least three years of continuous service in such paid office or position with Local 224 prior to the first day of April of 1956 or any subsequent year. In any case, qualification shall be attained upon, and the right to benefits shall be reckoned from, the first day of April after the expiration of the qualifying period.

* * * * *

"15. *Eligibility-Forfeiture:* Notwithstanding any other provision of this agreement and declaration of trust, no beneficiary shall be entitled to receive distribution hereunder unless at his separation date (or the separation date of the deceased covered employee under whom he claims) he (or the deceased covered employee, as the case may be) (1) shall have previously accepted this agreement and declaration of trust in writing, and (2) is a mem-

ber in good standing of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter called the Union. A separated employee shall be deemed to be a member of the Union in good standing although he may be in arrears in the payment of dues and assessments to the Union, but no person shall be deemed to be a member of the Union in good standing if at his separation date he has been expelled from the Union after a trial on charges preferred against him in accordance with the Union constitution. If at the separation date of a covered employee either of the conditions numbered (1) and (2) above is not met, then the separated employee (and any beneficiary claiming under him, in the event of his death) shall forfeit his right to receive distribution hereunder."[4]

It should be noted that on March 1, 1955, Occidental Life Insurance Company of California, Local 224's insurance carrier for the group insurance program issued Line Drivers Local 224 its check [Ex. 29] in the amount of $8,143.43 as its annual "Experience Rating Refund" for the year ending December 31, 1954 [R. T. 22].

On March 28, 1955, Woxberg, Dykes and the local's office manager, Miss Gladys Rang, opened a bank

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[4]Paragraph 15 of the Agreement was later the subject of a tax ruling by the Commissioner of Internal Revenue [Ex. P]. The request for the ruling was made with the cooperation of attorney Richard E. Perkins on behalf of the Severance Fund. The ruling provided in partinent part:

"Since Paragraph 15 of the trust provides that expulsion from the Teamsters International Union will cause a participant to forfeit all his rights to benefits under the trust, a contingency does exist. Therefore, Miss Rang's interest in the employer contributions was forfeitable when the contributions were made, and they were not includible in her gross income in the years contributed."

checking account in the name "Severance Fund, Line Drivers Local 224". Each signed the signature card [Ex. 1]. The $8,143.43 check was endorsed and used as the opening deposit [Ex. 1]. The Experience Rating Refunds for the years ending December 31, 1955, December 31, 1956 and December 31, 1957 were each in turn endorsed and deposited to this Severance Fund bank account [Exs. 30, 31 and 32].

For the sake of completeness it should be noted that the minutes for the Executive Board meetings and the general membership meetings during the period show the following: (a) March 27, 1955, Executive Board minutes signed by the appellant Dykes as Acting Recording Secretary:

> "After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the Secretary authorizing him to have an attorney draft a trust agreement covering severance pay for the paid officers and office manager, and deposit the insurance refund in the severance trust. Motion Carried" [Ex. 44].

(b) The April 3, 1955 Executive Board minutes signed by (co-defendant) Hester as Acting Recording Secretary:

> "The Secretary read the Severance Fund trust agreement. A motion was made and seconded that the Severance Trust agreement be approved effective April 1st" [Ex. 44].

On April 3, 1955, the general membership voted to go on strike at a special meeting [Ex. 44]. The strike occurred soon thereafter throughout the Western Con-

ference and lasted several months [R. T. 291]. Through the lengthy strike the rank and file teamsters won a pension plan [R. T. 291, 1245, 1246 to 2086].

In February of 1958 the group insurance for the local was withdrawn from Occidental Insurance Co., and was placed with Girardian Insurance Co., represented locally by a long time associate of Woxberg's [R. T. 1626]. The minutes of the general membership meeting of Local 224 on February 23, 1958 reveal that in discussing the cost of the group insurance the membership was unaware that Experience Rating Refunds were being received annually.

Occidental Insurance Company's effective group insurance premium at the time of this change, was 84 cents per member per month, less the amount of the annual Experience Rating Refund. Girardian Insurance Company's rate was a flat 50 cents per man per month without any Experience Refund [R. T. 1626-1632].

The February 23, 1958 minutes provide as follows:

> "In the discussion of changing insurance companies, a motion was made and seconded to change insurance companies and also to check into increasing the death benefit with the balance of the 34 cents without increasing the dues" [Ex. 44].

Beginning in March 1958, the month following the change in companies for the Local 224 group insurance and concurrent termination of the annual Experience Rating Refund payments, and continuing through October 1959 Dykes, Hester and Barnes each received a $500 Government Bond purchased by Local 224, however, the minutes of Local 224 are silent as to these benefits [R. T. 2497 and Ex. 43, 44 and 73].

During the summer of 1959 it appeared to Woxberg and Dykes that Congress was about to enact some labor legislation. Many discussions were had with union attorneys about the impact of the pending acts upon the operation of a union local [R. T. 1495-1499, 1638, 1639, 2109].

In the fall of 1959 Woxberg again went to his friend, attorney Richard E. Perkins and asked him to draft a document which would cover the distribution of the Severance Fund [R. T. 1878, 1879, 1659, 1660]. Woxberg was advised by Perkins to get the approval of the membership to such a distribution [R. T. 1643, 1847, 1848 and 1849]. This advice was not followed unbeknownst to Perkins [Ex. 44, R. T. 1908, 1911 and 1643]. A document entitled "Agreement for Termination of Trust and Distribution of Assets [Ex. G] was drafted and delivered to Woxberg by Perkins [R. T. 1878]. This document provided in part as follows:

> "2. The net assets of the trust, after paying any trust expenses, including attorney fees and any other expenses of winding up, shall be distributed by the trustees to the present beneficiaries of said trust or their nominees. Each beneficiary (or his nominee) shall receive a sum which represents that proportion of the net assets of the trust which the months of service of such beneficiary bears to the total number of months of service of all beneficiaries. 'Months of service' as used herein shall have the same meaning as in said agreement and declaration of trust, particularly sections 11, 14, and 16 thereof."

Perkins submitted his bill for services to Woxberg and was paid thereafter with a check drawn on Local 224's bank account [R. T. 1885, 1886, Exs. 100, 44].

Soon after the Severance Fund bank account was established the funds deposited therein were used to purchase second trust deeds [Exs. 1, 76]. In 1957 Larry McBride, of McBride Investments, a mortgage loan broker, who had been selling trust deeds to Woxberg during the preceding year was engaged by Woxberg to buy, service and manage investments purchased with Severance Fund bank account money [R. T. 114].

In September of 1959 Woxberg instructed McBride that he should trasfer the entire bank account and investment portfolio to Woxberg, Dykes, Hester, Barnes, Wasson and McBride consistent with the "Agreement for Termination of Trust and Distribution of Assets" [Exs. G, 1, 77 and 78].

On November 2, 1959 the distribution of the Severance Fund was made [Ex. 77]. Woxberg received $9,216.69; Dykes received $9,216.68; Hester received $6,824.57; Barnes received $5,211.91; Sidney Wassen and Joseph McBride received $2,356.94 and $2,251.40 respectively even though they were organizers [R. T. 234, 343], and not business agents, therefore not "covered employees" under the so-called Severance Fund [Ex. E]. The Severance Fund minutes indicate that Wasson and McBride were members of the Severance Fund on April 27, 1957 less than two years after they were employed [Ex. F]. The total distribution was $35,178.19 in cash and trust deeds [Ex. 77].

Woxberg, Dykes, Hester and Barnes formed a partnership to receive their shares of the distribution [Ex. 58, R. T. 150].

Larry McBride handled the transfer of the 22 trust deeds in the portfolio. He paid the $2.00 per trust deed recording cost and drafted the necessary transfer

documents. He billed the Severance Fund $220 through Woxberg for his services in connection with the winding up and distribution of the Severance Fund [R. T. 169 to 171, Ex. 2]. During the year in which he managed the Severance Fund investments McBride came to personally know Woxberg, Dykes, Hester and Barnes [R. T. 109].

Dorothy Johnson[5] the office manager of Local 224 was instructed by Woxberg to list for Executive Board approval on December 1, 1959, under the heading Miscellaneous Bills[6] the item "Larry McBride—Arbitration Audit—$220" [Ex. 2, R. T. 890 and 993]. On December 2, 1959, the item having been approved by Woxberg, Dykes, Hester and Barnes sitting as the Executive Board for Local 224, a check in the amount of $220 was drawn on the local's bank account signed by Woxberg and Dykes and made payable to Larry McBride. The descriptive charge noted on the check was "Arbitration Audit 220.00" [Ex. 2].

Larry McBride has never performed any services directly for Local 224, has never performed any audits for Local 224 and has never performed any arbitration for Local 224 or any other union [R. T. 172, 175 and 179].

Attorney Richard Perkins' legal fees for the termination agreement were similarly approved at the same

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[5]Dorothy Johnson succeeded Gladys Rang as Office Manager when Miss Rang died on April 13, 1957 [R. T. 506].

[6]Prior to the Landrum Griffin Act the Executive Board met once each month. After October of 1959 a special meeting of the board was held during the week and was attended normally only by Woxberg, Dykes, Hester and Barnes. The purpose of this special meeting was for the approval of bills. The bills would be classified and listed either as "Miscellaneous" or "Regular" [R. T. 865, 866].

meeting of the Executive Board and were paid from Local 224 funds and not from the Severance Fund as the termination agreement specified [Ex. 100, R. T. 1184].

During the entire period in which the Severance Fund was in existence no mention was made to the rank and file members of Local 224 [R. T. 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, Exs. 40, 43, 44 and 45], or to the rank and file members of the Executive Board [R. T. 238, 348, 515 and 550] and no mention was ever made of the fact that Occidental Insurance Company made annual "Experience Rating Refunds" [R. T. 2558].

On February 20, 1959, the check for the Experience Rating Refund for the year ending December 31, 1958 was issued by Occidental Insurance Company. This check was in the amount of $287.68[7] [Ex. 33]. Dorothy Johnson, the office manager, first saw this check when she opened the mail and did not know what it was for. She checked with Woxberg, who told her to post it on the machine. The check was posted, deposited in the local's bank account and noted in the local's books [R. T. 922, 923, Ex. 74]. No request was ever made by Woxberg, Dykes, Hester or Barnes for this money [Ex. 1 and R. T. 1637].

The September 27, 1959, minutes of the general membership meeting are silent as to any mention of the Severance Fund. The following excerpts from the minutes of the Executive Board meeting and the minutes of the general membership meeting on September 27, 1959, demonstrate the difference between the purported discussions at each meeting [Ex. 44].

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[7]This check was based upon the rating experience during 1958 prior to the change in group insurance carriers by the local.

Executive Board minutes, September 27, 1959:

> "Motion was made and seconded that the Secretary-Treasurer *and Trustees of Severance Fund* be authorized in conjunction with the attorneys to discontinue *the Severance Fund and* payment to the Pension Fund and car allowance to said employees and distribute these monies to the employees as salary; thereby placing the responsibility of reporting to the Government on the employee involved" (emphasis added).

General Membership minutes, September 27, 1959:

> "Motion was made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payment to the Pension Plan and car allowance to paid employees and distribute these monies to the employees as salary; thereby placing the responsibility of reporting to the Government on the employee involved."

The emphasis was added to the Executive Board minutes above to highlight the omissions of the words emphasized from the minutes of the general membership meeting.

During 1959 Woxberg, Dykes, Hester and Barnes each received several pay raises [R. T. 912, 913 and Ex. 73].

In March of 1962 a Grand Jury subpoena was served upon the local for its financial records. Immediately thereafter the records were found to be missing [R. T. 363, 390, 391, 895 and 896 and Ex. 103]. Several telephone calls were made from the local's office to appellant Woxberg in Las Vegas during this period [R. T. 1706, 1707, Ex. 103].

C. Counts Nine and Ten.

Late in 1960 Woxberg purchased a jeep in Las Vegas [R. T. 2005]. Dykes was requested to tow the jeep to the Los Angeles area for extensive repairs [R. T. 2005, 2006]. Dykes took the jeep to Frank's Automotive Service operated by Frank Whipple [R. T. 2007, 2008]. An examination of the vehicle revealed that the cost of the mechanical reconstruction necessary could be reduced by the purchase of surplus jeep parts [R. T. 2008].

On April 4, 1961, Dykes secured a check from the union in the amount of $355.00 payable to Frank's Automotive Service. The notation "Repairs H.L. Woxberg $355.00" was noted upon the check [Ex. 9] and in the schedule of bills approved by the Executive Board on the same date [Ex. 43, R. T. 883, 884]. It should be noted that Woxberg drove a union owned Cadillac during this period and all repairs and maintenance in addition to fuel and tires on this Cadillac were regularly purchased by the union [R. T. 928, 929 and Ex. 42]. Dykes drove a union owned Buick which was similarly treated [R. T. 928, 929 and 2114 and Ex. 42].

On April 7, 1961 Dykes met Frank Whipple at Coast Truck Parks where a used transmission, rear end, windshield and other parts were purchased by Whipple with his check [Ex. 70] in the amount of $275.00 [R. T. 789, Ex. 24].

The jeep was fixed and delivered to Dykes on April 15, 1961. Whipple billed "Avis M. Dykes" [Ex. 24], appellant Dykes' wife, for the $460.86 in parts and labor expended. He assumed the jeep belonged to Dykes [R. T. 799].

On April 21, 1961, Woxberg had a second check drawn on the Local 224 bank account [Ex. 10] payable to Frank's Automotive Service in the amount of $105.-86. Again the caption "Repairs H.L. Woxberg $105.-86" appeared in the upper left hand corner of the check. On April 24, 1961, Woxberg forwarded this check to Frank's Automotive Service "Attention Mr. Whipple" with a transmittal letter which he had dictated to Dorothy Johnson reviewing the transaction [Ex. 25]. Woxberg's letter stated as follows:

"Frank's Automotive Service
42 W. Live Oak Avenue
Arcadia, California

ATTENTION: Mr. Frank Whipple

Dear Mr. Whipple:

Enclosed you will find check #11607 in the amount of $105.86 which is the difference owing you on the repair work on the jeep per your invoice #8298.

You have received to date a check for $355.00 and the enclosed check makes up the difference for the total due of $460.86.

Very truly yours,

H. L. Woxberg
1616 West 9th Street, Rm. 322
Los Angeles 15, California

HLW:dj

Enclosure (ck—$105.86)"

The $105.86 was included with the "regular bill" for Executive Board approval on May 5, 1961 [R. T. 889 and Ex. 43].

Dykes concealed a subsequent payment for repairs to the jeep at Frank's Automotive Service by charging the cost of the repairs on his gasoline credit card through his neighborhood gas station [R. T. 2113 to 2124, 2207, 2208 and Exs. 71, AG-1, 42 and 104].

When Woxberg received his jeep he had it reupholstered and had a new top made. He also had it painted. When completed the jeep was taken to Woxberg's hunting cabin at Mammoth Mountain [R. T. 360, 361, 1539 to 1541].

The union also paid for Woxberg's auto insurance on the jeep [Exs. 91, 92, 95 and 96 and Ex. 42, R. T. 1713 to 1715].

In 1962, after the criminal investigation had uncovered the Frank's Automotive Service transaction, Dykes contacted Woxberg, who then repaid the union the full amount [R. T. 2020, 2021].

V.

Summary of Argument.

A. There was sufficient evidence to support the factual determination that the Severance Fund which was the subject of Count One of the Indictment, was money, funds, securities, property or assets of Local 224 at the time it was distributed by appellants to themselves and others.

B. There was sufficient evidence to support the factual determination that the distribution of the Severance Fund by appellants to themselves and others was criminal conduct as charged in Count One of the Indictment and as such prohibited by Section 501(c) of Title 29, United States Code.

C. There was sufficient evidence to sustain the convictions of appellants as to Count Two of the Indictment.

D. There was sufficient evidence to sustain the conviction of appellant Woxberg as to Counts Nine and Ten of the Indictment.

E. There was no prejudicial error in the giving or refusing of instructions.

VI.

Argument.

A. There Was Sufficient Evidence to Support the Factual Determination That the Severance Fund, Which Was the Subject of Count One of the Indictment, Was Money, Funds, Securities, Property or Assets of Local 224 at the Time It Was Distributed by Appellants to Themselves and Others.

Appellant does not contest the fact that the so-called Severance Fund was created and financed exclusively by the Experience Rating Refund checks [Exs. 29 to 32] issued to Line Drivers Local No. 224 by Occidental Life Insurance Co. of California [Exs. 1, 76].

Accordingly the Severance Fund was the asset and property of Line Drivers Local No. 224 on November 2, 1959, unless prior to that date the local transferred its interest in those funds to another.

Appellants asserted at trial that Local 224 transferred all of its right, title and interest in the Experience Rating Refunds, prior to September 14, 1959, the effective date of the Labor Management Reporting and Disclosure Act of 1959, pursuant to an Agreement and Declaration of Trust. This Agreement and Declaration of Trust was purportedly executed on April 3, 1955, effective April 1, 1955 by appellants and their convicted but non-appealing co-defendants and was entitled "Agreement and Declaration of Trust Severance Fund Line Drivers Local 224" [Ex. E].

This document recited that:

"1. Purpose of Trust:

(a) The membership of Line Drivers Local No. 224 . . . has by resolution duly adopted voted to make contributions to a severance fund . . .;

(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, . . ."

In support of this recital appellants urged that the minutes of the local's Executive Board meeting for March 27, 1955 and April 3, 1955, recorded by appellant Dykes and co-defendant Hester were authentic. These minutes provided in pertinent part as follows [Ex. 44]:

March 27, 1955

"After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the Secretary authorizing him to have an attorney draft a trust agreement covering severance pay for the paid officers and office manager, and deposit the insurance refunds in the severance trust. Motion Carried."

April 3, 1955

"The Secretary read the Severance Fund trust agreement. A motion was made and seconded that the Severance Trust agreement be approved effective April 1st."

Appellants and their co-defendants testified that these minutes were read and approved by the general membership at the March 27, 1955 and April 24, 1955 general membership meetings. These minutes were recorded by appellant Dykes [Ex. 44].

Evidence which contradicted the testimony of the appellants and recitals contained in the minutes and the Declaration of Trust was introduced by the prosecution.

In view of this conflict in the evidence, the trial court during its charge to the jury stated as follows:

"Now, I want to go back and discuss with you for just a moment or two the indictment. Count 1 concerns the severance fund and a large part of the testimony in this case concerns count 1, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not. I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

" 'The membership by resolution duly adopted voted to make certain contributions to a severance

fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

"Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count 1, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money.

"So in considering count 1, you are going to have to determine whether or not this money belonged to the union or belonged to the severance fund." [R. T. 2778, line 8 to 2779, line 25].

As stated by this court in *Mosco v. United States,* 301 F. 2d 180 (9th Cir. 1962), at page 181:

> "The jury, by its verdict, resolved all factual doubts in favor of the government. And this court must view the evidence in the light most favorable to support the judgment."

The evidence supporting this factual determination, stated briefly to avoid undue repetition of appellee's Statement of Fact would include the following:

1. The general membership had emphatically refused and manifested great hostility to appellants request for a pension plan in lieu of wage increases only

a year earlier in February and March of 1954 [Ex. 44, R. T. 633].

2. On April 3, 1955, the date the Executive Board, consisting of appellants and their co-defendants, purportedly approved the Severance Fund the general membership at a special meeting was engaging in a strike vote [Ex. 44].

3. On April 24, 1955 the date on which the general membership purportedly approved the Severance Fund the rank and file members were girding for a long and expensive strike [R. T. 291].

4. The appellants and their co-defendants were members of the Western States Teamsters Retirement Plan [R. T. 675-680]. In 1954 the general membership was already paying a per capita tax so that their officers could enjoy the substantial benefits of this plan. In addition to this tax the local was also paying the employee's contribution [R. T. 911, 1624].

5. Although the local through a monthly per capita tax retained a firm of attorneys the appellants concealed the creation and existence of the Severance Fund from them and employed the legal services of Woxberg's neighbor for the drafting of the Severance Fund document. Although the March 27, 1955 Executive Board minutes purport to authorize Woxberg to retain an attorney to draft a trust agreement Perkins had been already working for several months [R. T. 1495, 1496, 1318, 1319, 1812, 1813, 1814 and Ex. 44].

6. The Executive Board minutes of April 3, 1955 recite purported approval effective April 1, 1955 yet the final draft was not delivered until some time later [Exs. 44, 101 and R. T. 1813].

7. Perkins advised appellants to secure approval of the Severance Fund yet not only the creation of the Severance Fund was concealed but even its existence and later distribution was concealed not only from the retained attorneys but from the rank and file members of the Executive Board and the general membership as well [R. T. 1878, 1879, 1659, 1660, 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, 238, 348, 515, 550]. Even the Experience Rating Refunds were concealed from the rank and file's representative on the Executive Board [R. T. 1626].

8. The initial deposit in the Severance Fund bank account was a check issued March 1, 1955 but which was held for almost a month until March 28, 1955 before cashing.

Additional evidence of other acts of concealment directed towards the day the fund would be appropriated for the use of the appellants and others will in the interest of brevity be discussed later under the question of intent.

In view of this factual determination, supported by the evidence, that Line Drivers Local No. 224 did not transfer the Experience Rating Refunds to a trust, it is clear that ownership of the funds and income derived therefrom was and remained the money, funds, securities, property and assets of Local 224. This conclusion is consistent with the law of the State of California:

The *California Civil Code,* Sections 2233 and 2224 provide:

> "§2223. Involuntary trustee: thing wrongfully detained.

"*Involuntary trustee, who is.* One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

"§2224. Involuntary trustee; thing gained by fraud, wrongful act, etc.

"*Involuntary trust resulting from negligence, etc.* One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

This conclusion is consistent with the law of this Circuit as stated in *Brown v. New York Life Insurance Co., et al.,* 152 F. 2d 246, 250 (9th Cir. 1945):

"Appellant paid nothing for the insurance policies and as to her they were a gratituity. She is innocent of fraud perpetrated by herself, but as the lower court pointed out, even the widow of a trustee ex maleficio who has paid no consideration for the property purchased with misappropriated funds, or for their fruits, may not hold such property, or the fruits thereof, against the cestui que trust, who is the real owner. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation, becomes a particeps criminis however innocent of the fraud in the beginning."

See also *Commissioner v. Wilcox,* 327 U. S. 405 (1946) and *James v. United States,* 366 U. S. 213 (1961) overruling *Wilcox* on other grounds.

B. There Was Sufficient Evidence to Support the Factual Determination That the Distribution of the Severance Fund by Appellants to Themselves and Others Was Criminal Conduct as Charged in Count One of the Indictment and as Such Prohibited by Section 501(c) of Title 29, United States Code.

It was necessary for the Government to prove beyond a reasonable doubt that appellants intended to and did embezzle, steal, or unlawfully and wilfully abstract or convert to their own use or the use of others, moneys, funds, securities, assets and property of Local 224 in order to convict the appellants.

Taylor v. United States, 320 F. 2d 843 (9th Cir. 1963).

The jury was instructed pursuant to defendants' requested jury instructions as follows:

"Four essential elements are required to be proved in order to establish the offense of embezzlement as charged in the indictment:

"First, that the person charged was an officer of a labor organization or was employed, directly or indirectly, by a labor organization;

"Second, that the moneys, funds, securities or other assets alleged to have been embezzled belonged to or were owned by a labor organization;

"Third, that said moneys, funds, securities or other assets were lawfully in the possession of or under the control of the person or persons who allegedly embezzled said property at the time of the alleged embezzlement;

"Fourth, that such person or persons fraudulently appropriated said properties to his or their own

use or purpose or to a use and purpose not in the due and lawful execution of his or their trust." [R. T. 2767].

In addition the jury was instructed:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, shall be guilty of an offense.

"The term embezzle as used in this statute means the unlawful taking or conversion by a person to his own use or the use of another of moneys, funds, securities, property or other assets which come into his custody or possession lawfully by virtue of his office or employment. So to constitute embezzlement of the moneys, funds, securities, property or other assets of a labor organization by an officer or employee within the statute, it must appear from the evidence beyond a reasonable doubt that the money, funds, securities, property or other assets came lawfully into the possession of the employee and were, while so held by him unlawfully applied or converted to his own use or the use of another.

* * * * *

"The term 'steals' as used in the statute means any unlawful taking with intent to deprive the owner of the rights and benefits of ownership.

"You are instructed that any person who embezzles, steals or unlawfully and willfully abstracts

> or converts to his own use or the use of another any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, is guilty of a crime." [R. T. 2766, 2767, 2768].

As stated before in this brief the jury by its verdict resolved all factual doubts in favor of the Government and this court must view the evidence in the light most favorable to support the judgment.

Mosco v. United States, supra.

First, there was no question that appellants were officers and employees of a labor organization. It was stipulated at trial that both Woxberg and Dykes were officers and members of the Executive Board of Local 224 during all relevant times. It was stipulated between the parties in the trial court that Local 224 was a labor organization within the meaning of Section 402(i) of Title 29, United States Code [R. T. 531].

Second, the Severance Fund was money, funds, securities, property and assets of Local 224 as discussed in our previous argument.

Third, appellants did not question in the court below nor do they question here the uncontraverted facts that the appellants as principal officers of Local 224, being Secretary-Treasurer and President, respectively, had the power and authorization to sign checks drawn on the local's bank account. They shared this power only with their co-defendant Hester. The Experience Rating Refund checks issued by Occidental Life Insurance Company of California were properly delivered to the custody of appellants. It should be noted that only appel-

lants Woxberg and Dykes and their co-defendant Hester had the power to draw checks on the Severance Fund bank account. Accordingly the control of the Experience Rating Refunds and the fruits derived therefrom remained with appellants and Hester up to and including the date of the distribution of the Severance Fund.[8] The Severance Fund bank account was at all times maintained in the name of "Severance Fund Line Drivers Local 224".

Fourth, that appellants and their co-defendants fraudulently appropriated, wilfully abstracted and converted the Severance Fund monies, funds, securities and assets and property of Local 224 on November 2, 1959 is abundantly clear from the evidence.

The Experience Rating Refunds with the exception of the $287.68 refund for the year 1958, which was intercepted by Dorothy Johnson were not recorded in the local's books but were segregated and placed in the Severance Fund Line Drivers Local 224 bank account [Exs. 1, 33, R. T. 922, 923].

This was consistent with the concealment from the rank and file members of the existence of the Severance Fund and the concealment of the fact that the local was receiving Experience Rating Refunds [R. T. 1626, Ex. 44].

Joe McBride and Wassen were included in the Severance Fund even though they were not business

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[8]It should be noted that although Gladys Rang, the office manager of Local 224 had the power to sign Severance Fund checks there was no showing that she could do so without the authorization of appellants. There is also no showing that Miss Rang ever exercised any dominion or control over the Severance Fund bank account.

agents and had been employed less than three years, thus under any stretch of the term "covered employee" as used in the Severance Fund Agreement they were not eligible [Ex. E]. The purported minutes of the Severance Fund themselves show that on April 22, 1957, McBride and Wassen were members in spite of the fact that they had been employed less than two years before [Ex. F]. This inclusion of McBride and Wassen contrary to the agreement itself is only compatible with a desire on the part of appellants to buy silence from the only other full time male employees.

Contrary to the advice of appellant's own attorney the fact that the distribution of the segregated fund was concealed from the general membership by the systematic exclusion from the general membership discussion on September 27, 1954 of any reference to the Severance Fund. This fact is patently clear from the omissions of the words "and Trustees of Severance Fund" and "the Severance Fund and" from the minutes of the general membership meeting of that date [Ex. 44].

Finally the missing records [Ex. 103, R. T. 363, 390, 391, 895, 896, 1706, 1707]; the concealment from the union attorneys [R. T. 1495, 1496]; and the false caption used to disguise the payment to Larry McBride [Ex. 2] are indicia of fraud which cannot be ignored.

The distribution to the use of appellants and the others of the segregated funds was the first exercise of dominion or control over these funds exercised by appellants and their co-defendants; this was the first step beyond the "locus poenitentiae".

As quoted in *People v. Swanson,* 174 Cal. App. 2d 453, 344 P. 2d 832, 835, 836 (1959):

> [N]otwithstanding the appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet if he sold the same with the formed intention to defraud the owner, and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale. What is embezzlement? A fraudulent appropriation of the property of another, by a person to whom it has been entrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, * * *.

Appellee submits that based upon the evidence of this case the Severance Fund was appropriated and converted to the use of appellants on November 2, 1959, the date on which the distribution was made.

It is submitted that the term "converts" as used in Section 501(c) consistent with the requirements established in *Morissette v. United States,* 342 U. S. 246 has the same meaning as does the term "converts" under the law of Torts. *Brown v. Bullock,* 194 F. Supp. 207, 229 (S. D. N. Y. 1961).

It is therefore unnecessary to meet appellants *ex post facto* argument with additional arguments based upon the fact that appellants aided and abetted their nonappealing co-defendant in the commission of an offense which Barnes was unable to commit without their as-

sistance. It is also unnecessary to argue that the local retained an interest in the fund through the "forfeiture clause" in the face of the overwhelming facts demonstrating the union's complete title to the Refunds and their fruits.

Appellants did not urge at the trial nor do they here urge that the Severance Fund was instituted or maintained pursuant to a negotiated contract whereby Local 224 was under an obligation to make any payments to the Severance Fund. In fact the Severance Fund agreement itself recites in substance that all payments made thereto would be voluntary. Accordingly, appellants' argument based on the following authority cited in their brief must fail:

Carter v. United States, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957);

Glandzis v. Callincos, 140 F. 2d 111 (2d Cir. 1944);

Hooker v. Hoey, 27 F. Supp. 489 (D. C. S. D. N. Y. 1939);

Kennet v. United Mine Workers of America, 183 F. Supp. 315 (D. C. 1960);

Pacific American Fisheries v. United States, 138 F. 2d 464.

In each of the above cases the courts attempted to ascertain the rights of parties under negotiated contracts which were voluntarily executed. The courts have always been liberal in finding such compensation, based on these circumstances, to be wages.

The evidence in this case as demonstrated earlier in this brief disclose forcefully that the segregation of the Experience Rating Refunds was in no way connected

with the negotiation of a contract of employment or for wages. Such an argument by appellants would be hostile to their right to distribute the fund without the approval or acquiescence of Dorothy Johnson, who had been the office manager of the local for some 2½ years prior to the distribution, and approval or acquiescence of the union itself. The terms of the California Civil Code, Section 2258, provides:

> "§2258. Obedience to declaration of trust *Trustees must obey declaration of trust.* A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

It is abundantly clear that the fiduciary duty imposed by Section 501(a) of Title 29, United States Code, which was undoubtedly discussed with the union attorneys would, appellee submits, prevent the distribution of the Severance Fund, under these circumstances, as wages [R. T. 1495, 1499, 1638, 1639, 2109]. Any resolution to that effect would be contrary to public policy.

See also:

People v. Williams, 153 Cal. App. 2d 275, 314 P. 2d 493 (1957).

C. There Was Sufficient Evidence to Sustain the Conviction of Appellants as to Count Two of the Indictment.

Count Two of the Indictment was based upon a check in the amount of $220.00 drawn on the local's bank account Ex. 2]. Resolving all factual doubts in

favor of the Government and viewing the evidence in the light most favorable to support the judgment appellee submits that the evidence is sufficient to sustain appellant's conviction on this count.

With relation to Count Two, appellants appears to be skewed on the horns of a dilemma of their own creation. Much of appellants' brief is devoted to arguing the proposition that the Severance Fund was wrongfully taken prior to a time when such taking was a federal offense. There was no dispute in the court below nor do appellants contend here that the $220 paid to Larry McBride was for any obligation other than for his services rendered in connection with the winding up and distribution of the severance Fund. It is obvious that if the Severance Fund was wrongfully taken prior to the time that such taking constituted a federal offense the payment of the cost of distribution of this fund cannot be charged to the victim of the wrongful taking. It is sufficiently clear so as not to require argument that if the Severance Fund was wrongfully taken at any time that the local should not be charged with the expense of the distribution.

Assuming for the purpose of argument only that the Severance Fund was not wrongfully taken from the union and accepting for the purpose of argument appellants' contention that the union had no interest in the Severance Fund trust it is again patently obvious that the cost of distribution of such a trust fund is not a proper charge to the union.

A document purportedly executed on September 30, 1959 and entitled Agreement for the Termination of Trust and Distribution of Assets, which was signed

by the appellants after consultation with attorney Richard E. Perkins, states in pertinent part as follows [Ex. G]:

> "It Is Agreed:
>
> "1. The trust established by the 'Agreement and Declaration of Trust—Severance Fund Line Drivers Local 224, dated April 1, 1955, is hereby terminated, subject to the winding up and distribution of the trust assets.
>
> "2. The net assets of the trust, after paying any trust expenses, including attorney fees and any other expenses of winding up, shall be distributed by the trustees to the present beneficiaries of said trust or their nominees. . . ."

The appellants each knew Larry McBride and knew that he had never performed any services directly for Local 224 nor had he ever performed any audits for Local 224 or any labor union. In addition, Larry McBride was not an arbitrator and had not performed any arbitration for Local 224 or any other union [R. T. 172, 175, 179]. Both Larry McBride and Richard Perkins billed the Severance Fund for their services in connection with the distribution consistent with the agreement [Ex. G, R. T. 169, 170, 171]. Prior to the December 1, 1959 special Executive Board for the approval of the bills, appellant Woxberg instructed the office manager Dorothy Johnson to include a payment to "Larry McBride—Arbitration Audit—$220" [R. T. 890, 993]. Payment to McBride was approved at the December 1, 1959 Executive Board meeting and a check drawn on the local's bank account was issued to McBride in the amount of $220. The check was

signed by both of the appellants and bore the caption in the upper left hand corner "Arbitration Audit 220.00".

It is submitted that there is ample evidence to support the conviction of appellants as to Count Two of the Indictment.

D. There Was Sufficient Evidence to Sustain the Conviction of Appellant Woxberg as to Counts Nine and Ten of the Indictment.

Counts Nine and Ten of the Indictment were based upon two checks issued by Local 224, one in the amount of $355.00 and the other in the amount of $105.86. Both checks were issued to Frank's Automotive Service [Exs. 9 and 10].

At trial it was shown by the evidence that Woxberg purchased a jeep in Las Vegas which was badly in need of repairs [R. T. 2005]. Pursuant to Woxberg's request Dykes towed the jeep from Las Vegas to Los Angeles and took it to Frank's Automotive Service operated by Frank Whipple [R. T. 2007, 2008]. After reconstructing the jeep Whipple billed Avis M. Dykes, appellant's wife, for the work. The face amount of the bill was $468.86 [Ex. 24]. The first check in the amount of $355.00 was drawn on the union's account on April 4, 1961. On April 4, 1961 while the work on the jeep was in process, Dykes obtained a $355.00 check from the local payable to Frank's Automotive Service. On April 15, 1961, Frank's Automotive Service's bill charging Avis M. Dykes was submitted to Dykes. Dykes took this bill to the local where it was given to Woxberg. Woxberg then obtained a check in the amount of $105.86 from the local and enclosed it with a transmittal letter which reviewed the entire

transaction [Ex. 25]. A short time later Woxberg got Dykes to take the jeep back to Frank's Automotive Service for further repairs. On this occasion Dykes paid for the repairs with his gasoline credit card issued to him by the union [R. T. 2113, 2124, 2207, 2208, Ex. 71, AG-1, 42, 104].

Prior to taking the jeep to his mountain hunting cabin Woxberg had it reupholstered, painted and had a new top installed [R. T. 360, 361, 1539, 1541].

Prompted by the criminal investigation which had uncovered the Frank's Automotive Service transaction, Woxberg repaid the union a year later [R. T. 2020, 2021].

It is submitted that viewing this evidence in a light most favorable to the Government there is sufficient evidence upon which to sustain Woxberg's conviction on Counts Nine and Ten.

E. There Was No Prejudicial Error in the Giving or Refusing of Instructions.

Appellant urges as error the court's refusal to give defendants' proposed jury instructions No. 34, No. 38 and No. 47. The appellant also claims that the court erred in giving the following instruction which has already been discussed at length under a previous argument included in this brief:

> "Now I want to go back and discuss with you for just a moment or two the indictment. Count I concerns the severance fund and a large part of the testimony in this case concerns count 1, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not.

I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

" 'The membership by resolution duly adopted voted to make certain contributions to a severance fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

> "Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count I, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money."

Appellants omit the court's concluding remark with relationship to this charge which was as follows:

> "So in considering Count One, you are going to have to determine whether or not this money belonged to the union or belonged to the Severance Fund." [R. T. 2779, lines 23 to 25].

Appellants have also failed to comply with Rule 18(d) of the Rules of the United States Court of Appeals for the Ninth Circuit which provides in pertinent part as follows:

> "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objection urged at the trial."

Perhaps appellants' failure to comply with Rule 18(d) is in some way connected with appellants' failure to comply in the trial court with Rule 30 of the Federal Rules of Criminal Procedure which provide in pertinent part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In appellant's brief at page 23 it is asserted that the above instruction was objected to by appellants citing R. T. 2789, line 19 to page 2790, line 16. The following is the colloquy which took place between the court and Mr. Cooper, attorney for appellant Dykes:

> "The Court: Do the defendants have any objection to any of the instructions I read to the jury?
>
> "Mr Cooper: I think we have discussed it before, but since it is my duty to answer your Honor's question, on behalf of the defendants whom I represent, we respectfully request that we feel it is your Honor's duty to instruct that the law is that when title is in the trustees of a trust, under the law they are bound to find the defendants not guilty. I am certain, also, if your Honor please, that your Honor unintentionally—
>
> "The Court: Didn't I instruct the jury if they found this money had been transferred to the fund, that the defendants are not guilty?
>
> "Mr Cooper: Yes, your Honor did, but there is no contradictory evidence that that is a fact.
>
> "The Court: Well, there is a contradiction, because there is an interpretation of this agreement.
>
> "Mr. Cooper: All right, your Honor.
>
> "The Court: There is a contradiction. Otherwise, we wouldn't be here.
>
> "Mr. Cooper: I realize that. Counsel and I have discussed this before, and I was bound to call it to your attention." [R. T. 2789, 2790].

Under appellee's first argument included in this brief the contradictions noted by the court were discussed at length. Accordingly, in the interest of brevity they will not be again restated here.

With regard to Defendants' Proposed Jury Instruction No. 34, appellants again failed to comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure. The following is the discussion which occurred prior to the charge between counsel and the court with relation to this instruction:

"The Court: Your instruction No. 34, 'If you entertain a reasonable doubt that said funds belonged to said union, you are then instructed you cannot return a verdict on count 1 for the reason that in such circumstances, as a matter of law . . .' Supposing they have a reasonable doubt whether or not these funds belonged to the severance fund.

"Mr. Cooper: Well, your Honor please, they are only charged with embezzling from the union. They are not accused of embezzling from the severance fund.

"The Court: That's right. Mr. Murphy, have you got anything to say about that?

"Mr. Murphy: I object to the instruction. I don't think that in fact is the law.

"The Court: Mr. Murphy, I am sorry, but I was reading and I didn't get what you said. Will you repeat it?

"Mr. Murphy: The instruction is particularly objectionable in this language, 'As a matter of law, title in such funds would be in the severance fund and not Local 244.' That is not the law, your Honor, I submit to the court.

"Mr. Cooper: I don't follow counsel's reasoning.

"Mr. Murphy: Are we reading from the same instruction?

"Mr. Cooper: Yes. 'You are instructed that if you find from all the evidence that on or about November 2, 1949, funds in the sum of approximately $35,178 had been deposited in the severance fund, Line Drivers Local 224 trust, as authorized in the rules or by-laws of said Local 224, or if you entertain a reasonable doubt that said funds belonged to said union, you are then instructed that you must return a verdict of not guilty on count 1 for the reason that in such circumstances, as a matter of law, title in such funds would be in the severance fund and not Local 224, and, therefore, there could be no theft or embezzlement of union funds as charged in the indictment."

"Your Honor will recall the argument we made at the time we made the motion for acquittal at the conclusion of the Government's case. We contend as a matter of law the prosecution's evidence showed that the title was in the fund. Your Honor suggested that that was a question for the jury.

"The Court: I am going to tell them that, too.

"Mr. Cooper: And that is exactly what this instruction tells them.

"The Court: I don't like your wording. I am going to refuse the instruction, but I am going to comment to the jury along this line in my own way. I think I can cover that. I am not going to give this particular instruction because I don't like the way you have set it up.

Mr. Cooper: I note an exception. I understand we have to take exceptions." [R. T. 2694 to 2696].

No exceptions or objection was made by either of the appellants to the omission from the charge of their proposed instruction No. 34 prior to the time the jury retired to consider the verdict. It is clear from a reading of the instruction itself that the language is confusing and would have been repetitious if given with the charge discussed above.

It should be noted that appellant Woxberg did not object to the refusal of the court to include proposed instruction No. 34.

Defendant's Proposed Instruction No. 34 was refused by the court. The proposed instruction No. 34 provides as follows:

> " 'You are instructed that if you find from all the evidence that on or about November 2, 1959, funds in the sum of approximately $35,178 had been deposited in the severance fund, Line Drivers Local 224 Trust, as authorized in the rules or by-laws of said Local 224, or if you entertain a reasonable doubt, that said funds belonged to said union, you are then instructed that you must return a verdict of not guilty on count 1 for the reason that in such circumstances, as a matter of law, title in such funds would be in the severance fund and not Local 224, and, therefore, there could be no theft or embezzlement of union funds as charged in the indictment.' " [C. T. 172].

The court also refused to give appellants' proposed Instruction No. 38. This instruction reads as follows:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which

points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." [C. T. 175].

Once again appellants failed to comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure.

At the conference on instructions to be given the following colloquy took place with relation to Proposed Instruction No. 38: [R. T. 2697, line 2 through 2698, line 7].

"The Court: I am going to give the federal one rather than this one. I think the Ninth Circuit has turned down 38. 'If the evidence in this case is susceptible of two constructions or interpretations.' Is that right, Mr. Murphy?

"Mr. Murphy: Yes, your Honor.

"The Court: I think the Ninth Circuit has turned us down on that instruction.

"Mr. Neeb: May I be heard?

"The Court: Yes.

"Mr. Neeb: This is another way of talking about the reasonable doubt rule.

"The Court: We have harped on the reasonable doubt from the very beginning to the end and it will be mentioned another half dozen times.

"Mr. Neeb: What instruction would there be given on the rule of circumstantial evidence?

"The Court: I read you an instruction I usually give on circumstantial evidence.

"Mr. Neeb: That is the one in the book?

"The Court: That is the one in the book. If I remember rightly, Mr. Neeb, I don't know, but it seems to me since I have been trying this case the Ninth Circuit has come down with an opinion in which it criticizes this instruction.

"Mr. Neeb: I don't know what it is, because I didn't see it.

"Mr. Murphy: It was our case.

"Mr. Neeb: What is the citation:

"The Court: I don't know whether you lost it or won it.

"Mr. Murphy: We won it, fortunately, your Honor.

"The Court: So I will refuse 38. . . ."

A reading of the total charge reveals that the jury was properly instructed as to reasonable doubt.

As stated in *Taylor v. United States*, 320 F. 2d 843, 851 (9th Cir. 1963):

> "The jury was fully instructed concerning the necessity of finding the facts against appellant beyond a reasonable doubt in order to convict. The trial court did not err in refusing to give this further instruction on the point."

In *Strangway v. United States,* 312 F. 2d 283 (9th Cir. 1963), this Court held that in similar circumstances the refusal to give an instruction similar to appellants' proposed instruction No. 38, was not error.

Appellants assert that the refusal of the court to give Defendants' Proposed Instruction No. 47 was error. Again appellants do not comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure. This instruction provides as follows:

> "You are instructed that as matter of law the proceeds from funds resulting from contributions made to a pension plan are when distributed a form of wages. As a result if you find from the evidence in this case that the Executive Board of Local 224 had the power in itself to set wages and conditions of employment of employees of the Union then in that event the Executive Board was empowered to provide a pension plan and that they did not have to go to the general membership for that purpose.
>
> "Therefore if you find from the evidence in this case that the Executive Board alone set up a pension plan for payment at severance of employment to the paid employees this was doing only what they had a right to do."

For the reasons already set forth in appellee's earlier argument regarding the issue of whether or not the distribution of the Severance Fund was a form of wage it would appear appropriate to conclude that Proposed Jury Instruction No. 47 was properly refused. It should also be noted with relation to Proposed Jury Instruc-

tion No. 47 that the term "pension plan" as used therein is nondescriptive of the so-called Severance Fund and as such would be confusing to the jury.

An examination of appellants' proposed instructions Nos. 34 and 47 and that portion of the court's charge specifically excepted to in appellants' brief discloses that these tailored instructions are directed solely at Count One of the Indictment which was based on the so-called Severance Fund distribution, and not as to Counts Two, Nine and Ten. In reviewing instructions for prejudicial error this court has set forth in *Gilbert v. United States,* 307 F. 2d 322 (9th Cir. 1962) at page 326:

> "Having in mind the provisions of Rule 52(b) and the teachings of the above mentioned cases and others, we have examined the instruction of which appellants complain. We can find no plain error therein affecting the substantial rights of the appellants, nor can we find any error which would result in a manifest miscarriage of justice. We thus adhere to Rule 30 and refuse to delve into the merits of the contentions appellants make with respect to the instruction.
>
> "From an examination of the entire record it appears that the appellants were fairly tried and properly convicted of the crimes with which they were charged."

Appellee urges that the entire record reveals that appellants were fairly tried and properly convicted of the crimes with which they were charged.

VII.

Conclusion.

There being no error the convictions of the appellants Homer L. Woxberg, Sr. and Wayne Franklin Dykes should be affirmed as to all counts.

Respectfully submitted,

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Assistant United States Attorney,
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Assistant Chief, Criminal Section,

Attorneys for Appellee,
United States of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard A. Murphy

No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
Southern District of California
Honorable Harry C. Westover, Judge Presiding.

Appellants' Homer L. Woxberg, Sr., and Wayne Franklin Dykes Reply Brief.

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Honorable Harry C. Westover, Judge Presiding.

Appellants' Homer L. Woxberg, Sr., and Wayne Franklin Dykes Reply Brief.

Introductory Statement.

The crux of this appeal is the question of whether or not Section 501(c) of the Landrum-Griffin Act has been applied retrospectively with respect to the creation and dissolvement of the Severance Fund, Count One of the Indictment. In addition to erroneously stating Appellants' position as to Count One, Appellee in its brief has in the most part avoided meeting the legal contentions raised in our Opening Brief on this

point. Certain arguments were presented by Appellee which merit some comment and we will meet and answer these in our argument to follow.

The facts, we submit, have been adequately summarized in our Opening Brief and no useful purpose would be served here by repeating the essential facts. Appellee's statement of the facts adds nothing to the determination of the issues presented as to Count One except to attempt to unduly color the evidence in a light most favorable to its position. In our argument to follow we will make specific reference where necessary to the evidence and in particular will point out wherein the evidence has been misstated in Appellees' Brief.

ARGUMENT.

I.

The Prosecution and Conviction of Appellants Under Count One Constitutes an Ex Post Facto Application of Section 501(c) in Violation of Article I, Section 9(3) of the Constitution.

Appellee erroneously takes the position in its brief that Appellants' attack on Count One is solely a question of insufficiency of the evidence (Appellee's Br. pp. 4, 5, 30, 31-37, 43-45). In fact only in one place in Appellee's Brief is Appellants' "*ex post facto* argument" even mentioned and then it is dismissed without adequate argument or authorities (Appellee's Br. pp. 43-45). Appellee's entire argument in answer to our threefold attack on Count One is an assertion that the evidence is sufficient to support a factual determination that the Severance Fund was money, property and assets of Local 224 (Appellee's Br. pp. 31-45). As demonstrated in our Opening Brief and in the argument to follow, this was only one aspect of Appellants' attack on Count One.

First, as a matter of law, the conversion, lawful or unlawful, occurred when the insurance refund checks were deposited in the trust fund account, all of which occurred prior to the effective date of the passage of the Landrum-Griffin Act. Therefore the prosecution and conviction of Appellants under Count One constitutes an *ex post facto* application of Section 501(c). Accordingly, the District Court's instruction that this was a question of fact was in error (Appellants' Br. pp. 21-23; 33).

Second, even if we assume for sake of argument that this was properly a question of fact for the jury, the

evidence is insufficient to support the factual determination that the Severance Fund at the time that it was dissolved was an asset of Local 224 (Appellants' Br. pp. 24; 39). To the contrary, all of the evidence indicates without contradiction that title and ownership of the Severance Fund was in the trustees and not in the Union. Therefore, no conversaion of union property or assets occurred on November 2, 1959 when the Severance Fund was dissolved.

Third and finally, the evidence is insufficient to support a conviction under Count One because the conversion of the alleged union funds was done with the consent of the Local Union and under a bona fide claim of right. Therefore, the appropriation of the insurance refund checks was not unlawful as a matter of law (Appellants' Br. pp. 24-26; 42, 55).

1. The Conversion, Whether Lawful or Unlawful, Occurred as a Matter of Law, at the Time Each Refund Check Was Deposited in the Severance Fund Account.

Appellee states and Appellants concede that the refund checks at the time they were received by Appellants as union officials were property of Local 224. Appellee then asserts:

> "Accordingly the Severance Fund was the asset and property of Line Drivers Local No. 224 on November 2, 1959, unless prior to that date the local transferred its interest in those funds to another." (Appellee's Br. p. 31.)

This may be true but it is not necessarily determinative of the time of the alleged wrongful conversion in this case. It is certainly true that if the insurance

refund checks were converted *legally* prior to November 2, 1959, they would no longer be union funds. This is the gist of just one aspect of Appellants' attack on Count One. For we argued that Appellants acted under the authority of the By-laws of the Local Union when they created the Severance Fund and transferred the insurance refunds to the trust account as additional wages. Therefore, their conduct was not criminal, since they did that which they had the right to do and by this action title to the insurance refunds passed to the trustees (Appellants' Br. pp. 36-39; 42-54).

Appellee's answer to this contention was that because the Severance Fund was not the result of a "negotiated contract" it was not wages under the case authorities cited in our Opening Brief (Appellee's Br. pp. 44-45). This does not follow. Appellee concedes that Appellants' conduct of the affairs of the Local were governed by the By-laws (Appellee's Br. pp. 13-15). Therefore, it should follow that Appellants had the right to fix their wages with the approval of the Executive Board, as provided in the By-laws.[1] The evidence is uncontradicted that this function was regularly carried out in establishing the Severance Fund [Executive Board Meeting of March 27 and April 1, 1955, Ex. 44].

Does the fact that the Severance Fund was created for its paid employees under the authority of the By-laws of the Local Union, make it any less "wages"

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[1]Congress clearly had this exception in mind when they drafted the Landrum-Griffin Act. See specifically Section 501(a) and our argument with reference thereto on pp. 42-53, Appellants' Opening Brief.

under the authorities pertaining to pensions that Appellants have cited in their Opening Brief, as distinguished from a "negotiated contract" between a union and employer? Certainly not. It is well settled that union by-laws are just as binding on union members as the provisions of a "negotiated contract" between union and employers. [*Dyer v. Occidental Life Insurance Company of America,* 182 F. 2d 127, 130 (9th Cir. 1950); *Martin v. Kansas City Southern Railroad Company,* 197 F. Supp. 188, 191 (W.D.L.A. 1961)]. Furthermore, in *Hooker v. Hoey,* 27 F. Supp. 489 (D.C.N.Y. 1939), the pension plan under discussion was created unilaterally and voluntarily by the employer and was not the result of a "negotiated contract". Nevertheless, this still constituted wages to the employee (27 F. Supp. at p. 490).

Under these authorities and in this instance, it would follow that the Severance Fund constituted wages and that legal title passed to the trustees of the Severance Fund. Therefore the insurance refund checks were no longer property or assets of the Union when the Trust was dissolved on November 2, 1959.

If this is not true, then the insurance refunds were wrongfully appropriated in the first instance when the checks were endorsed by Appellants and deposited in the Severance Fund account. Thus, it is Appellee and not Appellants who is skewered on the horns of a dilemma. For the first appropriation, whether legal or illegal, forecloses prosecution and conviction under 501(c). In the first instance because nothing unlawful was done, and in the second instance because of well established constitutional principles prohibiting *ex post*

facto application of Federal legislation and Appellee cannot argue one position without admitting the other.[2]

Appellee, in a futile attempt to escape the horns of this dilemma, states at page 36 of its brief:

> "In view of this factual determination supported by the evidence [an erroneous premise which we will come back to in a moment] that Line Drivers Local No. 224 did not transfer the experience rated refunds to a trust, it is clear that ownership of the fund and income derived therefrom was and remained the money, fund, securities, property and assets of Local 224." (Bracketed words ours.)

Appellee supports this erroneous conclusion with citation to provisions of the California Civil Code involving involuntary trustees. They assert that since a person who wrongfully misappropriates another's property holds that property as an involuntary trustee for the rightful owner, there was no conversion in law under 501(c) at the time the insurance refund checks were transferred to the trust (Appellee's Br. pp. 36, 37). This is again a *non sequitur* and with all due respect to counsel for Appellee, a specious argument.

It is certainly true that anytime money or other property is wrongfully misappropriated, converted, or stolen, the owner can in a civil action recover that which is rightfully his. What Appellee fails to recognize is that the owner's basis for bringing an action to secure the return of his property within the purview of the involuntary trustee sections is that there has been in the first instance a wrongful conversion.

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[2]See argument in detail on this point in Appellants' Opening Brief, Point I, Subdivision 1, pp. 27-39.

Title does not pass because of the alleged criminal conversion. Thus in the case at bar if Appellants held the insurance refunds on November 2, 1959 as involuntary trustees as Appellee contends, then they did so because of the alleged wrongful appropriation in the first instance—when each refund check was endorsed and deposited in the Severance Fund account. Such wrongful appropriation would, if the Landrum-Griffin Act had been law, give rise to possible criminal prosecution under 501(c). The Government cannot, however, base a prosecution on a law which did not exist at the time of the initial wrongful conversion merely because the "involuntary trustees" make a subsequent transfer of the same funds—here the dissolution of the Severance Fund on November 2, 1959. Such conduct (a subsequent transfer) would not avoid the bar to prosecutions established by Title 18 U. S. C., Section 3282,[3] and cannot be used to avoid the application of Article I, Section 9(3) of our Constitution.

Thus Appellee cannot argue in one instance that the first appropriation was not lawful and passed no title to the trustees because it was done without authority and with fraudulent intent (and the trustees thereby held the property only as involuntary trustees), and then in the next breath argue that the criminal conversion occurred some four years later when the "illegal" trust was dissolved without authority and with fraudulent intent. For this argument not only misconstrues the legal effect of the doctrine of involuntary trust, but does not conform with well settled principles of criminal law requiring the union of act and intent, a legal, not factual, contention by Appellants which went

[3]Five year limitation on commencing prosecutions in non-capital cases.

unanswered in Appellee's Brief (Appellants' Br. pp. 33-36).

Therefore as a matter of law the conversion, if it were wrongful, occurred when the insurance refund checks were originally deposited in the Severance Fund account, all of which occurred prior to the effective date of the passage of the Landrum-Griffin Act. We submit that the prosecution and conviction of Appellants as to Count One constitutes a violation of Article I, Section 9(3) of the Constitution.

2. The Evidence Is Insufficient to Support a Factual Determination That the Severance Fund Was, on November 2, 1959, Money or Property of the Local Union Within the Provisions of Section 501(c).

The main thrust of Appellee's argument in response to our attack on Count One is that the evidence is sufficient to support a factual determination that the Severance Fund was property of the Union on November 2, 1959. In the first instance, Appellee contends that the evidence was contradictory on this issue (Appellee's Br. pp. 32 and 33). We ask this question: What contradictory evidence? No citation is made to the record, and it is certainly axiomatic that any point urged in argument which is not supported by proper reference to the record is without merit and cannot be considered.

Later on, Appellee seemingly sets forth what it contends are eight specific instances in which the evidence supports a factual determination that the Severance Fund constituted an asset of the Local Union (Appellee's Br. pp. 34-36). None of this evidence contradicts in any manner the evidence summarized in our Brief at pages 39 and 40, which indicates that the funds were

transferred from the Union to the trustees when the insurance refund checks were initially endorsed and deposited in the Severance Fund account. For example, what possible difference on the question of who owned the insurance refund checks could arise from the fact that on April 3, 1955, the date the Executive Board approved the creation of the Severance Fund, the general membership, at a special meeting, was engaged in a strike vote? Again, the fact that the final draft of the Executive Board Minutes was not delivered until some time later, though approved on April 1, 1955, could not possibly mean that title to the insurance refund checks, now in the Severance Fund, still belonged to the Union (Appellee's Br. p. 35).

Appellee has again, as throughout its entire Brief, ignored the principles of syllogistic reasoning in urging this point. For its minor premise—that there is conflicting evidence on this point—is unsupported by the record. To the contrary, the only evidence appearing on this point unequivocally indicates that title to the refund checks passed to the trustees of the Severance Fund as each check was endorsed and deposited in the fund account. We have, first, Exhibit E, the Trust Agreement, which by its terms establishes dominion and control over the insurance refunds as they are transferred from the Union to the Trust. Second, we have the uncontradicted testimony by the attorney who drafted the Trust instrument, Perkins, a qualified expert in this field, that the funds belonged to the Trustees and not the Union [Rep. Tr. p. 1818, line 1, to p. 1819, line 2; p. 1829, line 5, to p. 1831, line 17].

Therefore, there being no contradictory evidence on this point, Appellants' proposed Jury Instruction No. 47

should have been given, and it was error for the District Court to instruct that this was a question of fact [Rep. Tr. p. 2778, line 8, to p. 2779, line 22].

Finally, Appellee asserts that the Severance Fund was still money or property in the hands of the Union, though segregated, because the dissolution of the Severance Fund on November 2, 1959 was "the first exercises of dominion or control over these funds exercised by appellants and their co-defendants; this was the first step beyond the 'locus penitentiae'" (Appellee's Br. p. 42).

This argument is clearly not supported by the record and is without merit. In 1957, Appellants and their co-defendants as trustees, exercised the same kind of dominion and control over the Severance Fund by paying to Gladys Rang's Estate her proportionate share of the then existing fund, based upon the provisions for distribution under the Trust Agreement, Exhibit E [Rep. Tr. p. 165, line 2, to p. 167, line 19; Ex. 54]. The same formula for making this partial distribution was used in 1959 when the remainder of the Severance Fund was dissolved [Rep. Tr. p. 167, lines 20-22]. Such conduct, if necessary to establish the first step beyond the 'locus penitentiae" of which Appellee speaks, also occurred before the effective date of the passage of the Landrum-Griffin Act. If there ever was any embezzlement or wrongful appropriation, it would have occurred when the Union lost its ability to exercise its incidents of ownership over the insurance refunds. This is not only evidenced by the action of the trustees in making distribution to Gladys Rang's Estate, but also their action in investing these funds in second trust deeds, which conduct likewise occurred be-

fore the passage of the Landrum-Griffin Act [Rep. Tr. p. 109, line 15, to p. 116, line 22].

Therefore, if there were a factual question for the jury to determine, the uncontradicted evidence supports Appellants' contention that the Severance Fund was not money or property of the Local Union, within the provisions of Section 501(c), on November 2, 1959.

II.

The Evidence Is Insufficient to Support a Conviction Under Count One for a Violation of Section 501(c) Because the Conversion of the Union Funds Was Done Openly and Under a Bona Fide Claim of Right.

Appellants have, we submit, adequately set forth their position on this point in their Opening Brief at pages 55 to 63. Appellee makes no effort to answer the position taken by Appellants, that there can be no larceny or embezzlement when one takes another's property under a bona fide claim of ownership or right, which in this instance is based upon the authority conferred upon Appellants and the Executive Board under the Union's By-laws (Appellants' Op. Br. pp. 55-56). The main crux of Appellee's argument, that the evidence was sufficient to establish fraudulent intent, is based upon its view of the evidence that Appellants concealed the creation and dissolvement of the Severance Fund from the rank and file members (Appellee's Br. pp. 41-42). This argument is not only not supported by the record, but Appellee, in its Statement of Facts, has erroneously stated the record. On page 25 of its Brief, Appellee states:

> "During the entire period in which the Severance Fund was in existence no mention was made of it

> to the rank and file members of Local 224 [R. T. 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, Exs. 40, 43, 44 and 45], or to the rank and file members of the Executive Board [R. T. 238, 348, 515 and 550] and no mention was ever made of the fact that Occidental Insurance Company made annual 'Experience Rating Refunds' [R. T. 2558]."

This is not the fact. Each witness who testified concerning knowledge of the rank and file members of the existence of the Severance Fund, testified, not that there was no mention ever made of the Severance Fund, but that they had no memory as to whether it was ever mentioned at the general membership meetings that they attended. That this is the record can only be gleaned from a reading of both the direct and cross-examination of each witness who testified on this point. To assist the Court in reviewing this part of the record, we offer the following table of citations to the Transcript:

Witness	Appellee's References	Additional Testimony on the Same Point
McBride	R. Tr. p. 237.	R. Tr. p. 248, line 9 to p. 249, line 10; p. 259, lines 3-20.
Wassen	R. Tr. pp. 346, 347, 348.	R. Tr. p. 350, line 9 to p. 352, line 25.
Layman	R. Tr. pp. 512, 515.	R. Tr. p. 561, line 14 to p. 570, line 12.
Ottesen	R. Tr. p. 589.	R. Tr. p. 605, line 13 to p. 607, line 6; p. 612, line 21 to p. 613, line 14.
Logan	R. Tr. p. 633.	R. Tr. p. 638, line 21 to p. 639, line 22.
Carl	R. Tr. pp. 693, 697, 698.	R. Tr p. 712, line 4 to p. 713, line 19; p. 725, line 14 to p. 745, line 17.
French	R. Tr. p. 2543.	R. Tr. p. 2532, line 14 to p. 2538, line 9.

More particularly Appellee asserts that no mention was ever made of the "experience rating refunds" from Occidental Life Insurance Company, citing on page 2558 of the Transcript the testimony of McConachie, a rank and file member of the Executive Board during that period of time (Appellee's Br. p. 25). This again is not the fact, as McConachie's testimony was just exactly to the contrary. He testified that he had heard of such refunds while a member of the Executive Board [Rep. Tr. p. 2556, line 18, to p. 2558, line 14].

Thus, from an examination of the entire record, the most that can be said concerning this aspect of the case is that none of these witnesses had any recollection as to whether or not the Severance Fund was or was not mentioned during Executive Board Meetings or at the General Membership Meetings. However, the written record is to the contrary, as evidenced by the Minutes of both the Executive Board and General Membership Meetings [Exs. 43 and 44; summarized in Appellants' Statement of Facts, Opening Br. pp. 3-16].

In this connection Appellee again incorrectly states the record when on page 22 of its brief it is stated that "Woxberg was advised by Perkins to get the approval of the membership to such a distribution. This advice was not followed unbeknownst to Perkins." This is not the fact. Not only did the Executive Board approve the dissolution of the Severance Fund [Minutes of September 27, 1959, Ex. 44], but the minutes of the Executive Board were read and approved at the General Membership Meeting and a motion calling this matter to the attention of the general membership was made from the floor and carried as reflected in

the Minutes of the General Membership Meeting of September 27, 1959 [Ex. 44].

Based upon this record and the fact that the Appellants acted under the advice of an attorney[4], Perkins, and under at least a *bona fide* claim of right as delineated by the authority granted to them by the By-laws of the Local Union, the evidence is insufficient to support a finding of fraudulent intent.

III.

The Evidence Is Insufficient to Show Fraudulent Intent on the Part of Appellants With Respect to Count Two.

Here again, Appellee fails to meet the main thrust of Appellants' argument on this point. As stated in our Opening Brief, it is Appellants' contention as a matter of law, that the employees under a pension plan are entitled to the moneys due them without deducting expenses, which is exactly what happened in the case at bar (See *United States v. Carter,* 353 U. S. 210, 77 S. Ct. 793, 1 L.ed 2d 776 (1957)].

Again, Appellee in arguing the evidence under Count Two incorrectly states the record when at page 47 of its Brief it is asserted that ". . . appellant *Woxberg instructed the office manager Dorothy Johnson* to include a payment to 'Larry McBride—Arbitration Audit—$200'." This again is not the fact. Dorothy Johnson testi-

---

[4]Appellee in a footnote on page 17 of its brief attempts to draw an unfavorable inference that Appellants acted in bad faith because they did not consult the regularly retained Union attorneys in the creation and dissolution of the Severance Fund. However, since none of these attorneys were called as witnesses, there is no showing that they would have testified any differently than Perkins, the attorney who did advise Appellants and who did draft the trust agreement and the dissolution agreement.

fied that she had no recollection as to who told her to use the words "Arbitration Audit"; that it might just as well have been a mistake or misunderstanding on her part [Rep. Tr. p. 992, line 12, to p. 994, line 14]. Certainly such evidence is at least as consistent with innocence as with guilt and is not the kind of substantial evidence necessary to support a conviction, even when viewed in a light most favorable to the government.

IV.

The Evidence Is Insufficient to Show Any Taking or Fraudulent Intent on the Part of Appellant Woxberg to Sustain Convictions Under Counts Nine and Ten.

With respect to Counts Nine and Ten, it has been the position of Appellant Woxberg from the beginning that he never was a participant in the acts upon which the government relied in these transactions. During the entire period when the jeep repairs were made and paid for, Appellant Woxberg was out of the United States [Rep. Tr. p. 1520, line 20, to p. 1521, line 5; p. 1522, lines 2-3; p. 1537, lines 9-22].

The evidence is uncontradicted that all of these acts were performed by other defendants, namely Dykes and Hester, and both of these defendants were acquitted by the verdict of the jury. It is, therefore, impossible to understand how a person who took no part in the transaction could be found guilty, while those who took part in it were found not guilty.

On page 49 of Appellee's Brief it is asserted that after the criminal investigation "uncovered" the jeep transaction, Dykes "contacted" Appellant Woxberg, and he then repaid the Union for the repair bills. By this

Appellee attempts to leave one with the impression that Appellant Woxberg paid this after he heard about an investigation. This is not true. There was absolutely *no* evidence that Appellant Woxberg paid these bills after he learned of any investigation. The *facts* indicate that Dykes did what Appellant Woxberg had previously asked him to do. He sent a bill to Appellant Woxberg which was the only bill that Appellant Woxberg ever received. Appellant Woxberg, immediately upon receipt, paid the exact amount requested [Rep. Tr. p. 1395, line 10, to p. 1397, line 11; Ex. M]. If Dykes had sent the bill earlier, the payment would have been made earlier. There was no evidence to the contrary.

Therefore, there being no evidence of a fraudulent taking by Appellant Woxberg, his conviction under Counts Nine and Ten should be reversed.

V.

Appellants Complied With Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure With Respect to the Errors in the Giving and Refusing of Certain Instructions.

Appellee contends that Appellants failed to comply with Rule 18(d) in setting forth their specification of errors as to the giving and refusing of certain instructions. Apparently Appellee interprets Rule 18(d) as requiring not only the instruction being set out *"totidem verbis"*, but also that part of the record wherein specific objection is made (Appellee's Br. p. 51). Appellants know of no authority placing such an interpretation upon Rule 18(d) and we submit without further argument that we have complied with this rule in that respect.[5]

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[5]See citations to the record as required by Rule 18(d) on pp. 21-26.

Appellee also contends we failed to comply with Rule 30 (Appellee's Br. pp. 51-59). The District Court, in chambers with the consent of all counsel, including counsel for the government, specifically took the position that with respect to instructions given and refused, everything that was done by the court was deemed automatically accepted to [Rep. Tr. p. 2696, lines 1-10; p. 2801, line 1, to p. 2804, line 13]. Furthermore, how can Appellee take the position on appeal that Appellants have not complied with Rule 30 when it acquiesced in the procedure adopted by the District Court with respect to the objections to instructions [Rep. Tr. p. 2804, lines 1-12].

Specific mention should be made here of the District Court's failure to give defendants' proposed Jury Instruction No. 38 concerning circumstantial evidence and reasonable doubt [Clk. Tr. p. 175]. Appellee asserts that it is this Circuit's position that failure to give this instruction is not error, citing *Strangway v. United States,* 312 F. 2d 283 (9th Cir. 1963). This case, however, as this Court well knows, did not on this point make a decision on the merits because specific objection to this instruction had not been raised in appellants' opening brief (312 F. 2d at p. 285). Even if this Circuit has taken this position, this does not prevent Appellants from urging this Court to reconsider the prejudicial effect of the failure to give this instruction in circumstantial evidence cases.

Conclusion.

Based upon the authorities and arguments presented here and in Appellants' Opening Brief, the convictions of Appellants as to Counts One, Two, Nine and Ten should be set aside.

Respectfully submitted,

ROBERT A. NEEB, JR.,
Attorney for Appellant Woxberg,

GRANT B. COOPER,
Attorney for Appellant Dykes.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ROBERT A. NEEB, JR.

No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

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Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Presiding Judge Stanley N. Barnes and the Honorable Circuit Judges Charles M. Merrill and M. Oliver Koelsch of the United States Court of Appeals, Ninth Circuit:

Pursuant to Rule 23 of this Court, appellants Homer L. Woxberg, Sr. and Wayne Franklin Dykes respectfully petition this Court for rehearing in the above captioned case.

After the filing of extensive Briefs and the hearing of oral argument, the opinion and decision of this Court was filed on March 12, 1964. This decision reversed both appellants' convictions under Count 1 and appellant Woxberg's conviction under Counts 9 and 10 and affirmed the conviction of both appellants under Count 2. This petition is directed to Count 2 only.

Grounds for Granting a Rehearing.

I.

The decision of the Ninth Circuit as to Count 2 is in conflict with the principle and decision of the United States Supreme Court in *United States v. Carter,* 353 U. S. 210, 77 S. Ct. 793, 1 L. ed. 2d 776 (1957), because the Trial Court and this Court must find that the "Severance Fund" was a valid and legal trust, since no evidence to the contrary appears in the record of the proceedings below. (Points I(2) and II(1) of A. O. B.) As stated in the Opinion of the Court at page 14:

> "Appellants argue that the union had 'a continuing duty to see to it that the funds contained therein were distributed to the employees as a gross amount.' (Br. p. 65.) This is valid argument to a jury, but not to this court. Reliance is placed on *United States v. Carter,* 1957, 353 U. S. 210, but the facts of that case do not resemble those here present. *To make that case applicable would require us to find that the original creation of the severance fund was lawful,* a question which we do not reach because of our determination that the lack of retroactive effort of § 501(c) is here controlling as to Count I, and a question decided adversely to appellants by the jury." (Emphasis added.)

A finding, however, it is respectfully submitted, this Court must reach as a matter of law in deciding Count 2.

II.

The decision of the Ninth Circuit is in error in ruling that the evidence of fraudulent intent is sufficient as to Count 2 because there is no evidence from which a reasonable inference can be drawn that the words "arbitration audit", relied upon in the Opinion as the evidence of fraudulent intent, were placed on the check in question under the direction of either appellants, since Mrs. Dorothy Johnson, the bookkeeper, called as a government witness, testified that she had no independent recollection of the source of said terminology [R. Tr. p. 993, line 8, to p. 994, line 9], and that she had no memory as to who told her to put the words "arbitration audit" on the check, if at all [R. Tr. p. 992, line 21, to p. 994, line 14].

For the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation and submission of this Brief for rehearing that the same is, in my judgment, well founded and that it is not interposed for delay.

GRANT B. COOPER